SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1959

No. 137

UNITED STATES OF AMERICA, PETITIONER,

vs.

WILLIAM J. BROSNAN, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

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A IN THE UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,711

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM J. BROSNAN, FRANCIS H. JACOB, MARTHA M. BERG, GEORGE H. A. PARKMAN, GLADYS MARIE SHORT PARKMAN, and MOUNTAIN ENGINEERING COMPANY, APPELLEES

On Appeal from the Judgment of the United States District Court for the Western District of Pennsylvania

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Appendix B to Appellant's Brief—Filed October 23, 1958

(File endorsement omitted)

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 15973

UNITED STATES OF AMERICA

vs.

WILLIAM J. BROSNAN, FRANCIS H. JACOB, MARTHA M. BERG, GEORGE H. A. PARKMAN, GLADYS MARIE SHORT PARKMAN, and MOUNTAIN ENGINEERING COMPANY

Docket Entries

Date 1957	
July 12	Complaint filed.
July 12	Summons issued.
July 30	Summons returned served 7/15/57 on defts. George H. A. Parkman, Gladys Marie Short Parkman and Mountain Engineering Co. and Wm. J. Brosnan; served on Francis H. Jacob 7/23/57; on Mrs. Martha M. Berg 7/22/57.
July 30	Answer of Martha M. Berg to complaint filed.
Aug. 2	Answer of George H. Parkman, Gladys Marie Short Parkman and Mountain Engineering Company, led with acceptance of service thereon by counsel for pltf. and counsel for William J. Brosnan, Francis H. Jacob and Martha M. Berg.
Aug. 5	Answer of Francis H. Jacob, deft. filed with acceptance of service of within answer and notice to plead to new matter by counsel for pltf. and notice to plead to new matter by counsel for pltf. and counsel for the Parkmans and Mountain Engineering Co. affixed thereto.

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Aug. 5 Answer of William J. Brosnan, Deft. filed with acceptance of service of within answer and notice to plead to new matter by counsel for pltf. and counsel for the Parkmans and Mountain Engineering Co. affixed thereto.

Dec. 19 Petition of Martha M. Berg for Dismissal of action as to her filed and Order of Willson, J., signed January 3, 1958, entered that as the Petitioner has no interest and will claim no interest in the real estate involved herein, that Martha M. Berg be dismissed as a party defendant in this case.

1958

Jan. 6 Pursuant to Order of Willson, J. entered 1/3/58, Martha M. Berg is hereby dismissed as a party defendant in this case.

JAMES H. WALLACE, JR., *Clerk*

Jan. 6 Notices mailed.

Jan. 22 Non Jury Trial held before Willson, J. and concluded C.A.V. Trial memo filed.

Jan. 23 Subpoena to Leonard H. McMillen, Deputy Sheriff in charge of Real Estate Sales, Sheriff's Office, Allegheny County, Pittsburgh, Pa. returned served Jan. 21, 1958.

Jan. 23 Order entered fixing time for oral argument on Mar. 6, 1958 at 2:00 P. M. before Willson, J.

Mar. 5 Order entered continuing argument to March 26, 1958 at 9:30 A.M.

Mar. 21 Transcript of proceedings on non-jury trial held 1/22/58 at Pgh., Pa. before Willson, J. filed.

Mar. 26 Hearing on Redemption after Sheriff Sale begun before Willson, J. and concluded C.A.V. Trial memo filed.

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Apr. 29	Opinion and Order of Willson, J. entered directing judgment be entered in favor of the defendants and against the plaintiff and that the complaint and civil action number be dismissed.
May 1	Pursuant to Order, Judgment is hereby entered in favor of the defendants and against the plaintiff and the Complaint and Civil Action Number are hereby dismissed.
	JAMES H. WALLACE, JR., *Clerk*
May 1	Notices mailed.
June 30	Notice of appeal filed by U. S.
July 1	Copies of notices mailed U. S. Court of Appeals and counsel for defts.; letters to U. S. Attorney and Judge Willson.
July 3	Order of Miller, J. entered extending time to file record and docket appeal for 90 days from filing of notice of appeal. (copies mailed U. S. Court of Appeals and appellees' counsel)
Sept. 22	Original record on appeal mailed U. S. Court of Appeals.

 IN UNITED STATES DISTRICT COURT

Complaint—Filed July 12, 1957

Now, comes the United States of America by D. Malcolm Anderson, United States Attorney in and for the Western District of Pennsylvania, and complaining of the defendants alleges:

I.

That this section is authorized and sanctioned by the Commissioner of Internal Revenue, the delegate of the Secretary of the Treasury, and is brought at the direction of the Attorney General of the United States.

II.

That at all times mentioned herein, this plaintiff has been and now is a sovereign corporation and body politic.

III.

That the defendant, William J. Brosnan, is presently residing at 608 North Homewood Avenue, Pittsburgh, Pennsylvania.

IV.

That the defendant, Francis H. Jacob, resides within the jurisdiction of this Court and is presently doing business at 718 North Homewood Avenue, Pittsburgh, Pennsylvania.

V.

That Mrs. Martha M. Berg, widow of J. D. Berg, is presently residing at 820 Beaver Road, Sewickley, Pennsylvania.

VI.

That the defendants, George H. A. Parkman and Gladys Marie Short Parkman, are husband and wife and are presently residing at Sharon Grade Road, Coraopolis, Pennsylvania.

5

VII.

That the defendant, Mountaineer Engineering Company, is a domestic corporation doing business within the jurisdiction of this Court.

VIII.

That the Commissioner of Internal Revenue assessed various withholding, FUTA, and FIAC tax deficiencies against Mountain Engineering Company for the tax periods indicated by the attached schedule marked Exhibit B and on the dates and in the amounts described in the aforesaid schedule; that notice of each of the described assessments was served upon the Mountaineer Engineering Company on or about the date alleged in said schedule; that the Mountaineer Engineering company has refused

to pay each of the alleged assessments and the outstanding principal balances due on each of the assessments is indicated by the said schedule, plus interest and penalties according to law; that the assessment list in respect to each assessment was received by the Collector or District Director on the date indicated by the said schedule; and that notice of lien for each assessment was filed with the Prothonotary of the Court of Common Pleas of Allegheny County on the date indicated in the said schedule.

IX.

That the District Director of the Internal Revenue for Pittsburgh, Pennsylvania on July 6, 1955 assessed an income tax deficiency for the calendar years 1948, 1949 and 1950 against George H. A. Parkman and Gladys Marie Short Parkman in the amount of $9,767.68; that notice of this assessment was mailed to each of these alleged taxpayers on July 7, 1955, and that demand for payment of this assessment was made upon each of these taxpayers on July 7, 1955; that both George H. A. Parkman and Gladys Marie Short Parkman have refused to pay this assessment and the outstanding principal sum on this assessment is $9,767.68, plus interest and penalties according to law; that the assessment list in respect to this assessment was made by the District Director on July 6, 1955, and that notice of lien for this assessment was filed with the Prothonotary of the Court of Common Pleas, Allegheny County, Pennsylvania on October 13, 1955.

X.

That on January 28, 1948, the defendant Martha H. Berg and J. D. Berg, her husband now deceased, conveyed to George H. A. Parkman and Gladys Marie Short Parkman a certain tract of land situated in Moon Township, Allegheny County, Pennsylvania, consisting of 175 acres, more or less, a description whereof is attached hereto, made a part hereof and marked Exhibit A; that as part of the consideration for this conveyance the defendants George H. A. Parkman and Gladys Marie Short Parkman executed and delivered a mortgage and accompanying bond to

Martha M. Berg, and J. D. Berg, which mortgage was dated January 28, 1948, was recorded in the Office of the Recorder of Deeds of Allegheny County in Mortgage Book Vol. 2924, Page 48, and which mortgage encumbered the premises described in Exhibit A attached hereto.

XI.

That since January 28, 1948, the defendants George H. A. Parkman and Gladys Marie Short Parkman have caused the real property described in Exhibit A attached hereto to be conveyed to the defendant Mountain Engineering Company, and to be re-conveyed to said George H. A. Parkman and Gladys Marie Short Parkman on at least two occasions; and that by virtue of said conveyances federal-tax liens securing the assessments alleged in Paragraphs VIII and IX encumbered the real property described in Exhibit A attached hereto.

XII.

That the defendants George H. A. Parkman and Gladys Marie Short Parkman fell in arrears in their payments on the bond given to defendant Martha M. Berg, and said defendant Martha M. Berg caused judgment to be confessed against defendants George H. A. Parkman and Gladys Marie Short Parkman before the Prothonotary of the Court of Common Pleas of Allegheny County, Pennsylvania, on June 7, 1955, in the sum of $43,134.00; that on June 7, 1955, defendant Martha M. Berg, by praecipe, caused the Prothonotary of the Court of Common Pleas of Allegheny County, Pennsylvania, to issue a writ of *fieri facias* directing the sale of the real property described in Exhibit A attached hereto by the Sheriff of Allegheny County.

XIII.

That after advertising the sale of the involved property by the Sheriff but before the actual sale by the Sheriff, the defendant Martha M. Berg attempted to subject the United States to the jurisdiction of the Court of Common Pleas of Allegheny County pursuant to Section 2410, 28 U.S.C. for the purpose of removing the aforementioned

federal tax liens as encumbrances from the involved real property described in Exhibit A attached hereto.

XIV.

That on December 30, 1955, Martha M. Berg assigned the judgment *pro confesso* against the defendants George H. A. Parkman and Gladys Marie Short Parkman, together with the securing mortgage to the defendants William J. Brosnan and Francis H. Jacob.

XV.

That on January 3, 1956, the Sheriff sold the real property described in Exhibit A attached hereto pursuant to the writ of *fieri facias* issued by the Prothonotary of the Court of Common Pleas of Allegheny County on June 7, 1955; and that the defendants William J. Brosnan and Francis H. Jacob bid the real property in at the Sheriff's sale for the sum of $6,203.23.

XVI.

That the sale price of $6,203.23 realized at the Sheriff's sale is but a small fraction of the actual or forced sale value of the involved real property.

XVII.

That if jurisdiction over the United States was obtained by the Court of Common Pleas of Allegheny County, Pennsylvania pursuant to Section 2410, 28 U.S.C., for the purpose of removing the federal tax liens hereinbefore alleged from the involved property described in Exhibit A attached hereto, then the United States acquired the right to redeem the involved property from the Sheriff's sale during the period of one year from the date of the sale; that the United States attempted to effectuate any right of redemption it may have in the involved premises by tendering on January 3, 1957, to said defendants William J. Brosnan and Francis H. Jacob the sum of $6,575.42, which sum represented the execution sale price plus interest from the date of the sale.

XVIII.

That the defendants William H. Brosnan and Francis H. Jacob refused the tender made by the United States on January 3, 1957.

XIX.

That the defendants William H. Brosnan and Francis H. Jacob refused to recognize the right of the United States to redeem the involved real property from the Sheriff's sale except upon such conditions that negated any right to redeem from the Sheriff's sale.

XX.

That the defendants George H. A. Parkman, Gladys Marie Short Parkman, Mountaineer Engineering Company, William J. Brosnan, Francis H. Jacob, and Martha M. Berg may have or claim to have some interest in the real property described in Exhibit A attached hereto.

WHEREFORE, plaintiff prays that it be awarded the following relief:

1. That the defendants named herein be required to answer this complaint alleging any interest they may claim to the real property involved herein.

2. That this Court determine and adjudicate that the Court of Common Pleas of Allegheny County acquired no jurisdiction over the United States for the purpose of foreclosing the alleged federal tax liens as encumbrances on the involved real property.

3. That this Court determine and adjudicate that the alleged federal tax liens are encumbrances on the involved real property.

4. That this Court determine and adjudicate the relative priorities of the federal tax liens and the claims asserted by the defendants named herein.

5. That this Court order the involved real property sold by the Marshal of this Court and that the proceeds of such sale be distributed in accordance with this Court's adjudication of the relative priorities of the claims asserted against the involved real property in this action.

6. In the alternative, if this Court determines and adjudicates that the Court of Common Pleas of Allegheny County did acquire jurisdiction over the United States and that the alleged federal tax liens were foreclosed as encumbrances on the involved real property, that this Court determine and adjudge that the United States exercised its right of redemption within the statutory period, and that this Court order the present titleholder to convey the premises in question to the United States upon receipt of the purchase price, plus interest, or upon receipt of whatever sum this Court deems proper, and further, that this Court grant all other such orders as are appropriate to effectuate the plaintiff's right of redemption.

/s/ D. Malcolm Anderson
D. MALCOLM ANDERSON
United States Attorney

/s/ Thomas J. Shannon
THOMAS J. SHANNON
Assistant

July 1957

Exhibit B to Complaint

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SCHEDULE

TYPE OF TAX	PERIOD OF TAX	AMOUNT ASSESSED	DATE ASSMT. LIST RECEIVED	NOTICE AND DEMAND	LIEN RECORDED	DATE LIEN NUMBER	ASSESSED BALANCE	ACCOUNT NUMBER
FIC	4Q 1948	$2,395.24	3/14/49	3/16/49	4/11/49	13,682	$2,395.24	Feb.49—5318
FUT	1948	1,402.29	3/14/49	3/16/49	4/14/49	13,686	1,402.29	Feb.49—220115
WT	4Q 1948	13,508.95	3/18/49	3/22/49	4/25/49	13,753	13,508.95	Mar.49—20359
WT	1st Q 49	5,644.92	7/21/49	7/25/49	8/29/49	14,659	5,644.92	Jul.49—20191
WT	2nd Q 49	8,745.89	8/24/49	8/29/49	9/26/49	14,897	8,745.89	Aug.49—20294
FUT	1948	2,580.63	9/30/49	10/3/49	10/4/49	14,939	2,580.63	Sep.49 Com.Sp.4 2-1
FUT	1949	6,125.42	10/17/51	10/23/51	11/28/51	17,330	6,125.42	Oct.51 Com.#2 96

12 IN UNITED STATES DISTRICT COURT

Answer of William J. Brosnan, Defendant—Filed August 5, 1957

Now comes William J. Brosnan, one of the defendants in the above entitled case, by his attorneys, William L. Jacob and William J. Jacob, Jr., and makes the following Answer to the Complaint filed by the plaintiff in the above entitled case:

I.

The allegation contained in Paraegraph I is neither admitted nor denied and if the same be material, defendant will demand strict proof thereof at the trial of this case.

II.

The allegation contained in Paragraph II is admitted.

III.

The allegation contained in Paragraph III is denied. This defendant never resided at 608 North Homewood Avenue, Pittsburgh, Pa. His residence is and has been at all times hereinafter mentioned 143 South Dallas Avenue, Pittsburgh, Pa.

IV.

Defendant is informed, believes and therefore avers that he is not required to answer Paragraph IV.

V.

Defendant is informed, believes and therefore avers that he is not required to answer Paragraph V.

VI.

Defendant is informed, believes and therefore avers that he is not required to answer Paragraph VI.

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VII.

Defendant is informed, believes and therefore avers that he is not required to answer Paragraph VII.

VIII.

Defendant is informed, believes and therefore avers that he is not required to answer Paragraph VIII.

IX.

Defendant is informed, believes and therefore avers that he is not required to answer Paragraph IX. He admits the filing of said tax assessment in the Prothonotary's Office of Allegheny County, Pennsylvania.

X.

The allegations contained in Paragraph X are admitted. The said mortgage and its accompanying bond are dated January 28, 1948 and the judgment for $43,134.00 plus interest from June 1, 1955, entered on said bond at DSB 3089 July Term, 1955, relates back to January 28, 1948 and antedates all claims and tax liens held by plaintiff against said Parkmans, and the Mountain Engineering Company.

XI.

The allegations contained in Paragraph XI are admitted.

XII.

The allegation contained in Paragraph XII is admitted. Plaintiff failed to state that the said sale was by proper order of court, postponed until Tuesday, January 3, 1956.

XIII.

In answer to the allegation contained in Paragraph XIII, defendant avers that the plaintiff was brought
14 under the jurisdiction of the Common Pleas Court of Allegheny County, Pa., pursuant to Section 2410, 28 U.S.C. for the purpose of removing the aforementioned federal tax liens as encumbrances from the subject property. A petition to join the United States of America as additional party was prepared by J. Wray Connally, Esq. as counsel for Martha M. Berg and the same was presented in the Common Pleas Court of Allegheny County, Pa. at Fi. Fa. 521 July Term, 1955, sur DSB 3089 July Term, 1955, and on September 22, 1955, a rule was granted on the United States of America, George H. A. Parkman and Gladys Marie Short Parkman, to show cause why the United States of America should not be made a party to these proceedings, which rule was returnable within sixty days. The petition and rule were duly served

on the plaintiff and on the said Parkmans. No answer was filed within the sixty day period either by the United States of America or by the said George H. A. Parkman and Gladys Marie Short Parkman and consequently, on December 20, 1955, by order of the Common Pleas Court at the aforementioned number and term, the United States was joined as an additional party defendant to the end that the taxes due the United States of America enumerated hereinabove shall be divested by the sale of the real estate described in said petition, Exhibit "A". The said petition and rule and order of court are of record in the Prothonotary's Office of the Common Pleas Court of Allegheny County, Pa. at Fi. Fa. 521 July Term, [illegible]5, and by reference thereto are made a part hereof.

XIV.

It is admitted that on December 30, 1955, Martha M. Berg sold and assigned the judgment at DSB 3089 July Term, 1955 against the said George H. A. Parkman and Gladys Marie Short Parkman and also sold and assigned the mortgage and bond aforementioned to the defendants, William J. Brosnan and Francis H. Jacob, as tenants in common.

15 XV.

On January 3, 1956, the Sheriff of Allegheny County sold the real property described in Exhibit "A" to the use-plaintiffs in the said writ, namely, William J. Brosnan and Francis H. Jacob as tenants in common, on their nominal bid of "consts and taxes" and for which they were required to pay and did pay to the Sheriff the sum of $6,608.38. Their aforementioned judgment of $43,134.00 plus interest from June 1, 1955, was extinguished.

XVI.

Defendant denies that the sale price of said property to him and Francis H. Jacob was $6,203.23. On the contrary, he avers that he and the said Francis H. Jacob, as tenants in common, paid to the sheriff of Allegheny County, Pa. the sum of $6608.38 on their bid of "costs and taxes" and the judgment which they held against this property in the sum of $43,134.00 plus interest from June 1, 1955 was extinguished. They subsequently paid the

1956 land taxes against this property in the sum of $1340.29 and the 1957 land taxes in the sum of $1488.74, and also paid title examination fees and incurred attorney's fees.

XVII.

Defendant concedes that the United States has the right to redeem the involved property during the period of one year from the date of the Sheriff's Sale, to wit, January 3, 1956; but avers that such redemption must be in an amount that will reimburse the defendant and his co-tenant for their investment, to wit, the amount of the judgment entered on bond accompanying mortgage, interest, taxes and Sheriff's costs and other items due the owners as senior lienors, which amount in this particular instance, at the time of the alleged tender to him on January 3, 1957, was $55,591.28 itemized as follows:

16

To debt at DSB 3089 July Term, 1955	$43,134.00
To interest thereon June 1, 1955 to January 3, 1957	4,112.11
To costs and taxes paid at Sheriff's Sale	6,608.38
To interest thereon January 3, 1956 to January 3, 1957	396.50
To 1956 land taxes	1,340.29

to which sum should also be added the costs of title fees and attorney fees incurred by this defendant and by the said Francis H. Jacob. No such tender was made to this defendant. He denies that the plaintiff made any proper tender to him on January 3, 1957. No tender at all was made to Francis H. Jacob. On that date, an attorney representing the plaintiff, merely exhibited to this defendant a check for $6,575.42 which the said attorney stated was the amount of the sale price plus interest. No tender of cash was made to this defendant. The amount of said check was grossly inadequate as mentioned above.

XVIII.

As mentioned above, on January 3, 1957, a check for $6,757.42 was shown to this defendant, but he refused to

accept it because it was insufficient in amount. No tender of any kind was made to said Francis H. Jacob.

XIX.

The allegations contained in Paragraph XIX are denied. This defendant has been informed, believes and therefore avers that the United States did have the right to redeem the subject property within one year from the date of the Sheriff's Sale held on January 3, 1956, but he has also been advised, believes and therefore avers that such redemption is equivalent to a re-purchase and that the plaintiff did not make a proper and good tender, nor did it offer to pay a sum of money that was proper,
17 sufficient and adequate under the circumstances to constitute a tender, as more fully and at large set forth in Paragraph XVII hereof.

XX.

In answer to Paragraph XX, defendant avers that he and Francis H. Jacob, as tenants in common, are the sole and exclusive owners of the subject real estate and that the other parties named as defendants have no right, title, interest or claim in the same and neither does the plaintiff. The plaintiff has no right to redeem as it failed and neglected to comply with the law pertaining to redemption. No proper and legal tender was made to this defendant within the period of one year from the date of the Sheriff's Sale hereinabove mentioned, to wit, January 3, 1956, and no tender of any kind was made to said Francis H. Jacob.

WHEREFORE, defendant, William J. Brosnan, avers that the plaintiff is not entitled to the relief sought and respectfully asks that the Complaint in the above entitled case be dismissed, with costs allowed to this defendant.

NEW MATTER

(a) Plaintiff was brought under the jurisdiction of the Common Pleas Court of Allegheny County, Pa. by virtue of proceedings enumerated by defendant in Paragraph XIII of this Answer. Martha M. Berg, widow, by assignment piece of record in the Prothonotary's Office of Allegheny County, Pa. at DSB 3089 July Term, 1955, sold and assigned all her right, title and interest in and to the said judgment for $43,134.00 plus interest from June 1, 1955

to Francis H. Jacob and William J. Brosnan, which assignment by reference is made a part hereof.

(b) The amount paid by the said Francis H. Jacob and William J. Brosnan to the Sheriff of Allegheny County, Pa. on their bid of "cost and taxes" at the sale held on January 3, 1956, was $6,608.38. The judgment which they held against the said Parkmans by virtue of assignment from Martha M. Berg aforementioned, for $43,134.00 plus interest from June 1, 1955, was extinguished. Up to January 3, 1957, no proceedings were instituted by the said William J. Brosnan and Francis H. Jacob or either of them, to establish or claim any deficiency and no such proceedings could thereafter be instituted.

(c) The subject proceedings were instituted by the plaintiff at the behest of the Parkmans and their counsel to enable the said Parkmans to make a collateral attack on a regular and bona fide Sheriffs' sale, which collateral attack is contrary to the laws of the Commonwealth of Pennsylvania. Defendant also avers that these proceedings were also instituted for the benefit of the said Parkmans to enable them to effect a re-sale of this subject property to their own profit and advantage after they had neglected and refused to bid for the same at the Sheriff's sale held on January 3, 1956, all at the expense, loss and detriment of this defendant and Francis H. Jacob.

(d) Defendant is informed, believes and therefore avers that the funds or money represented by the check shown this defendant on January 3, 1957, was not funds owned by the plaintiff but by the Parkmans or their friends as prospective purchasers of the subject property.

(e) The said Parkmans filed no exceptions to the Sheriff's sale aforementioned, but thereafter retained possession of the building on this subject property and failed and refused to pay rent for the same. At No. 1618 January Term, 1957, this defendant and Francis H. Jacob were required to institute proceedings in Common Pleas Court to acquire possession. In that case, the Parkmans filed an answer and called upon the United States of America to assist them in a defense, calculated to delay matters and deprive the owners of their lawful rights, which pro-

ceedings are hereby referred to and made a part
19 hereof. The said Parkmans also instituted proceedings against this defendant and Francis H. Jacob at No. 109 July Term, 1957, in the Common Pleas Court of Allegheny County, Pa. in equity, which proceedings are frivolous, without merit and calculated to cause delay and prevent this defendant and Francis H. Jacob from enjoying the use and benefit of the property which they, in good faith, bought and paid for. Said suit is by reference made a part hereof.

Respectfully submitted,

/s/ William L. Jacob
/s/ William L. Jacob, Jr.

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20 IN UNITED STATES DISTRICT COURT

Government's Exhibit 1

Copy of D. S. B. Docket Entries.

Commonwealth of Pennsylvania,
Allegheny County, ss.:

Among the Records and Proceedings of the Court of Common Pleas in and for the County of Allegheny, and State of Pennsylvania, the following is a true and correct copy of the D.S.B. Docket Entries at No. 3089 July Term, 1955, to-wit:

D.S.B. Docket Entry.

Martha M. Berg,

#3089 vs. Narr.

George H. A. Parkman, Jr., and Gladys Marie Short Parkman, His Wife

Penalty $90,000.00. R.H. $43,134.00.

And now, June 7, 1955, comes William C. Hurtt, and upon warrant of Atty. filed in Bond Dated January 28, 1948, appears for Dfts. and confesses judgment against Dfts. for Ninety Thousand and 00/100 Dollars to be re-

leased upon payment of Forty Three Thousand One Hundred Thirty Four and 00/100 Dollars (Including Interest to June 1, 1955 and Atty's Com.) with costs of suit. Waiving Inq., Cond. and Exemp. Payable as per conditions of Bond Filed. Bond accompanies a mortgage recorded in Mortgage Book Vol. 2924, Page 48. The precise residence of the Plff. is: Township of East Harwich,
21 Chatham P.O. Massachusetts, and the last known of the Dfts. is: Sharon Grade Rd., Moon Twp.
Time: 9:56 AM.

DAVID B. ROBERTS, Prothonotary (JL)

Dec. 31, 1955 per writing filed and for value received this judgment. debt interest and costs are hereby assigned to WILLIAM J. BROSNAN and FRANCIS H. JACOB, their heirs and assigns.

DAVID B. ROBERTS, Pro.

Fi. Fa. 521 July 1955

Commonwealth of Pennsylvania,
ALLEGHENY COUNTY, ss.:

I, DAVID B. ROBERTS, Prothonotary of the Court of Common Pleas in and for said County, Certify that the foregoing is a full and correct copy of the D. S. B. Docket Entries wherein MARTHA M. BERG Plaintiff and GEORGE H. A. PARKMAN, JR., and GLADYS MARIE SHORT PARKMAN, His WIFE, Defendants; as the same remains of record before the said Court, at No. 3089 of July Term, A. D. 1955 D.S.B.

IN TESTIMONY WHEREOF, I have hereunto set my hand and affixed the seal of the said Court, the 19th day of March A.D. 1957.

s/ DAVID B. ROBERTS
Prothonotary,
By s/ LOUIS W. SAUERS
Deputy

[SEAL]

Government's Exhibit 2

Copy of EXECUTION Docket Entries.

Commonwealth of Pennsylvania,
ALLEGHENY COUNTY, ss.:

Among the Records and Proceedings of the Court of Common Pleas in and for the County of Allegheny, and State of Pennsylvania, the following is a true and correct copy of the EXECUTION Docket Entries at No. Fi.Fa.521 July Term, 1955, to-wit:

EXECUTION Docket Entry.

MARTHA M. BERG

521 vs.

GEORGE H. A. PARKMAN, JR., and GLADYS MARIE SHORT PARKMAN, HIS WIFE

Fi. Fa. Sur. No. 3089 Jul. Term, 1955.

DOCKET D.S.B.

Penalty, $90,000.00		
Real Debt	43,134.00	
Int. from, June 1, 1955		
Atty's	10.00	J.W.C.
Pro. F.,	1.00	12 31 55.
Sheriff		
" M.,		

WAIVING INQ. COND & EXEMPTION

June 27, 1955, upon motion of John M. Feeney, Jr., Petitioner, it is hereby ordered that the Sheriff Sale at
23 the above number & term of the real estate of George H. A. Parkman and Gladys Marie Short Parkman, his wife, be postponed from July 5, 1955, to Sept. 12, 1955, that no alias writ of Fi. Fa. be required, and that said sale be held without additional advertising, it is further ordered that a certified copy of this order shall be delivered promptly to the Sheriff of Allegheny County, Pa. September 12, 1955, it is ordered that Sheriff Sale be postponed to the first Monday of December, 1955; that no alias writ of

Fi. Fa. be required and that said sale be held without ADDITIONAL ADVERTISING, FURTHER, A CERTIFIED copy of this Order be delivere dpromptly to the Sheriff of Allegheny County. September 22, 1955, petition presented in open Court, and a Rule is granted on the United States of America, GEORGE H. A. PARKMAN, JR., and GLADYS MARIE SHORT PARKMAN, to show cause why the UNITED STATES OF AMERICA should not be made a party to this proceeding. October 6, 1955, Affidavits of service of petition by Registered Mail on Defendants and on Atty. General of the United States of America filed. P.O. receipt attached, 9-28-55, at 10:40 A.M. served United States of America as additional party at their place of business, Federal Building, Grant Street, Pittsburgh, Pa., by handing to John A. DeMay, Jr., Assistant U.S. Attorney in charge thereof for the time being a true and correct copy of the within petition and rule making known to him the contents thereof.

SO ANSWERS WILLIAM H. DAVIS, SHERIFF

Dec. 5, 1955, on motions sale postponed to First Monday of January, 1956. Dec. 20, 1955, on motion rule absolute and United States of America is hereby joined as a party Defendant to the end that taxes due the United States of America enumerated in said petition and the tax lien in favor of United States of America subsequently filed Oct. 13, 1955 in Prothonotary Office of Allegheny County
24 at No. 13623 being additional income tax for the year 1948-1949-1950 in the amount of $9,767.68 against said George Parkman, Jr. & Marie Parkman shall be divested by sale of real estate described in said petition being made by the Sheriff of Allegheny County on Jan. 3, 1956 after which sale the said real estate so sold shall be free & clear of all liens. Jan. 14, 1956, Leonard H. McMillen Real Estate deputy Sheriff of Allegheny County, appeared before David B. Roberts, Prothonotary and acknowledged deed to William J. Brosnan and Francis H. Jacob, Eodie, notice of acknowledgment posted. Jan. 23, 1956, no exception being filed to Sheriff sale same is confirmed absolutely and deed re-delivered to Sheriff. Jan. 25, 1956, certificate of Recorder of Deed filed, showing Sheriffs Deed Recorded in D.B. Vol. 3510, Page 64. Jan. 27, 1956, I do certify that by virtue of this writ to me directed, after due public and

timely notice by me given, according to law, of the time and place of sale, I did on Tuesday, Jan. 3, 1956 at 10:00 o'clock A.M. at the Court House, City of Pittsburgh, expose the premises within described to sale by public vendue or outcry, and then and there sold the same to William J. Brosnan and Francis H. Jacob for the sum of $6203.23 they being the highest and best bidder, and that the highest and best price bidden for the same which sum I have applied as follows, to-wit:

To cost in full on this writ	446.33
To John McGrady, Co. Treas. 1952-53-54-55 Tax	1636.74
To Robert VanderVoort, Sol. 1952-53-54-55 Twp. & School Tax	4120.16
	6203.23

So Answers

25 So Answers

William H. Davis, Sheriff

Sheriff Pd.	5.00
M. "	1.00

Commonwealth of Pennsylvania,
Allegheny County, ss.:

I, David B. Roberts, Prothonotary of the Court of Common Pleas in and for said County, Certify that the foregoing is a full and correct copy of the Execution Docket Entries wherein Martha M. Berg Plaintiff and George H. A. Parkman, Jr. and Gladys Marie Short Parkman His Wife Defendants; as the same remains of record before the said Court, at No. Fi. Fa. 521 of July Term, A. D. 1955.

In Testimony Whereof, I have hereunto set my hand, and affixed the seal of the said Court, the 19th day of March A.D. 1957.

s/ David B. Roberts
Prothonotary.

By s/ Louis W. Sauers
Deputy

[Seal]

26 IN UNITED STATES DISTRICT COURT

Opinion and Order—April 29, 1958

Opinion

WILLSON, District Judge

In this civil action the United States seeks to enforce liens for unpaid taxes. The controversy arises because admittedly the tax liens were junior in point of time to a duly recorded purchase money mortgage on the real property in question. The mortgage has been foreclosed. The defendants, who were the purchasers at the mortgage foreclosure sale, claim that the mortgage foreclosure proceedings divested the unpaid tax liens of the Government. The Government contends that the unpaid tax liens were not divested by the foreclosure sale. The Government is proceeding under the authority of 26 U.S.C.A. 7403, entitled "Action to enforce lien or to subject property to payment of tax." In the alternative, under 28 U.S.C.A. 2410, the Government seek the right to redeem the real property from the foreclosure sale which has been held under and pursuant to the laws of the State of Pennsylvania.

Defendants are William J. Brosnan and Francis H. Jacob, the purchasers of the property at the mortgage foreclosure sale, who had, prior to the sale, purchased the mortgage from Martha M. Berg, one of the original mortgagees, who was named defendant but has been dismissed. Other defendants are George H. A. Parkman and Gladys Marie Short Parkman, who were owners of the property during times when some of the tax liens were assessed and filed, and Mountain Engineering Company, a corporation, who also owned the property at various times during which tax liens were assessed and filed in the Office of the Prothonotary of Allegheny County.

The case was tried non-jury upon evidence which was largely stipulated; however, some testimony was taken.

27 There is no material conflict in the evidence as to what has occurred. Findings of fact and conclusions of law will be found in this opinion as permitted by Rule 52 of the Federal Rules of Civil Procedure.

The property in question consists of 175 acres more or less and is valuable. It was formerly owned by Martha M. Berg and her husband, J. D. Berg. On January 28, 1948, the Bergs conveyed the property to George H. A. Parkman, Jr. and his wife Gladys Marie Short Parkman, taking back a purchase money mortgage dated January 28, 1948, and recorded in Mortgage Book Volume 2924, page 48, for $45,000 and a mortgage bond in the penal sum of $90,000. The realty was then conveyed and reconveyed by the Parkmans to Mountain Engineering Company, a corporation, which they controlled, and back again on at least two occasions. These conveyances were all subject to the purchase money mortgage. During a period when the corporation owned the property, certain Federal Unemployment Tax Act and Federal Insurance Contributions Act tax deficiencies of Mountain Engineering Company, which were assessed by the Commissioner of Internal Revenue, became liens on the involved real estate. These liens were filed of record in the office of the Prothonotary of Allegheny County between April 12, 1949 and November 28, 1951.

In addition, the Commissioner of Internal Revenue assessed an income tax deficiency of $9,767.68 against George H. A. Parkman and Gladys Marie Short Parkman on July 6, 1955, at a time when they owned the property, this assessment being filed in the office of the Prothonotary of Allegheny County, Pennsylvania, on October 13, 1955.

It thus appears and is conceded that all the Government tax liens were filed of record in the office of the Prothonotary subsequent to the recording of the mortgage.

Default having occurred in the payment of the mortgage debt, on June 7, 1955, Martha M. Berg, the surviv-
28 ing mortgagee, caused a confession of judgment on the mortgage bond to be entered in the office of the Prothonotary of Allegheny County at D.S.B. 3089 July Term 1955. The debt recited in the judgment is the sum of $43,135.00 principal, plus interest from June 1, 1955.

Martha Berg's attorney caused a praecipe to issue by the Prothonotary, directing the sheriff to sell the property on a writ of *fieri facias*. The sale was duly advertised as required by state law and was originally set for July 5, 1955, but by various orders of the Common Pleas Court, the sale was postponed from July 5, 1955 to January 3,

1956, at which time the sale was held by the sheriff, who sold the property to defendants Brosnan and Jacob, who in the meantime, in December, 1955, had purchased the mortgage and bond from Martha M. Berg. At the sale the defendant purchasers paid the sheriff the sum of $6,203.23.

At this point the action of Martha M. Berg in invoking 28 U.S.C.A. 2410 should be mentioned. On September 22, 1955, she filed a petition in the Court of Common Pleas of Allegheny County for a rule upon the United States and the Parkmans to show cause why they should not be made parties to the foreclosure proceedings. The rule was granted and served upon the United States and the Parkmans. No answer or response was filed by either the Parkmans or the United States within the sixty day period set forth in the rule. On December 20, 1955, the rule was made absolute by the state court. In the rule to show cause served upon the United States, the judgment creditor sought an adjudication of the state court that the Government tax liens would be divested by the sale on the writ of *fieri facias* issued on the judgment confessed on the mortgage bond. Such a judgment under Pennsylvania law makes the lien of a judgment confessed on a mortgage bond relate back to the entry of the recording of the mortgage. *Boyer* v. *Webber*, 22 Pa. Super. 35; *DeWitt's Appeal*, 76 Pa. 283.

29 As mentioned, the Government paid no attention to the state court proceedings until January 3, 1957, which the Government contends is one day less than one year from the date of the sale of the property and is the last day it could redeem the property according to its right of redemption secured to it under 28 U.S.C.A. 2410. On that day, January 3, 1957, Robert X. Blair, revenue officer, attempted to effect a redemption of the property by making a tender. He testified that he had a Government check in the amount of $6,575.42, which represented the amount bid at the sheriff's sale plus interest, and that he contacted the defendant William Brosnan, stated his purpose, offered Mr. Brosnan the check and it was refused, because Mr. Brosnan considered the amount to be wholly inadequate. He, however, referred the revenue officer to his lawyer, William L. Jacob, Esq. No attempt was made to tender redemption money to the other co-owner, Francis H. Jacob,

because the attorney, William L. Jacob, Esq., indicated that the sum offered would not be accepted.

It should be emphasized that the foregoing was the only effort made by the Government to redeem. During the one year interval both the purchasers at the sale resided in and had places of business in the greater metropolitan area of Pittsburgh and had telephones listed in their names at their homes and places of business.

On January 3, 1957, defendants Brosnan and Jacob contend that they had in the property $55,591.28, which was the amount of their mortgage debt reduced to judgment, plus interest, taxes and costs. They contend that that was the amount the Government should have tendered in redemption of the premises under Section 2410.

DISCUSSION OF LAW AND CONCLUSIONS

If the mortgagee has correctly and validly made the United States a party to the foreclosure action under 28 U.S.C.A. 2410, and the sale was a judicial one, the foreclosure of the mortgage discharged and extinguished the unpaid taxes as liens on the property and transferred such liens to the fund created by such sale, if any. However, it is my opinion that the defendants did not properly invoke Section 2410 to make the United States a party to the state action.

It must be emphasized that the judgment of confession on the mortgage bond had already been entered and the property had been advertised and the sale date fixed when a rule to show cause was issued calling upon the United States to answer as to why it should not be made a party. It seems clear that to properly invoke Section 2410, the United States must be named initially as a defendant in the state court civil action. The statute permits the United States to be named as a defendant, the Government thus waiving its immunity, in a proceeding brought to foreclose a mortgage or other lien ". . . upon real or personal property on which the United States has or claims a mortgage *or other lien*." But the statute requires that a complaint ". . . shall set forth with particularity the nature of the interest or lien of the United States." It contemplates that the United States shall have sixty days to answer to the merits. The most that can be said about the proceedings in the instant case is that an attempt was

made to make the United States a party to the execution of a judgment already entered, towit, on June 7, 1955. One method that Pennsylvania lawyers use under this section, which in the opinion of this court is effective and valid, is to commence a mortgage foreclosure by the issuance of a *scire facias sur* mortgage. If that proceeding is used, the United States can be made a party prior to the entry of the judgment of foreclosure on the mortgage. The judgment entered in that event would be a judgment on the merits binding upon the United States as to the amount due on the mortgage debt, and of the nature and character of the Government's lien. I do not think that the statute requires that the pleadings served upon the government must necessarily be designated a complaint, but a pleading in substantial compliance with the statute is required. It is therefore concluded that Section 2410 was not validly invoked by the mortgagee in the foreclosure of the instant mortgage.

31

The Government claims that it had the right under Section 2410, if it was made a party to the state action, to redeem the property within one year as provided in that section. This issue is quickly disposed of.

Just recently, that is on April 11, 1958, the Court of Appeals decided *United States* v. *Cless*, 3 Cir., —— F.2d ——. This decision determines that Section 2410 is not mandatory but only permissive in the foreclosure of a first mortgage on property which is encumbered by a second mortgage owned by the United States. Having held that Section 2410 was not validly invoked by the mortgagee in the instant case, it might be said to follow that the Government has no right of redemption, because such a right is only given under Section 2410. But assuming that the section was not invoked, then the query is, does the United States have the right to redeem? That question need not be answered here, because certainly the amount tendered was wholly inadequate in any event.

If the Government's position is accepted, the effect is that it can redeem by paying approximately one-eighth of the amount of the mortgage debt. The Supreme Court had this very issue before it in the case of *Collins* v. *Rigas*, 81 U.S. 491, and its opinion quoted below should be sufficient

answer that the amount necessary to be tendered in order to redeem property is the full amount of the mortgage debt.

> "It is clear that the criterion by which the amount tendered was gauged was incorrect. To redeem property which has been sold under a mortgage for
32 less than the mortgage debt, it is not sufficient to tender the amount of the sale. The whole mortgage debt must be tendered or paid into court. The party offering to redeem proceeds upon the hypothesis that, as to him, the mortgage has never been foreclosed and is still in existence. Therefore he can only lift it by paying it. The money will be subject to distribution between the mortgagee and the purchaser, in equitable proportions, so as to reimburse the latter his purchase-money and pay the former the balance of his debt."

See also *American Loan & Trust Co.* v. *Atlanta Electric Ry. Co.*, 99 F. 313; and 37 Am. Jur. 837. It is therefore the conclusion of this court that no redemption by the Government has been accomplished in this case.

The point is now reached in this case and is squarely presented as to whether the subordinate Federal tax lien was cut off by the foreclosure of the purchase money mortgage pursuant to the law of Pennsylvania. This foreclosure under state law was accomplished exactly as was done in *United States* v. *Cless*. It should be repeated as was stated in that decision, that it is not necessary to join the subordinate lienors in a foreclosure action, nor to give them actual notice. However, as I view this decision, the precise question now under consideration has not been decided. An authoritative decision is desirable.

Federal tax liens and their relation to the foreclosure of mortgages have recently been the subject of several articles in legal publications. Divergent views are expressed and there is no unanimity of opinion and agreement as to whether Federal tax liens are divested by the foreclosure of prior mortgages. This court finds it is on the horns of a dilemma because of two authoritative decisions. The line of cases which accepts *Metropolitan Life Ins. Co.* v. *United States*, 6 Cir., 107 F.2d 311, as authoritative held that the Government tax lien is not divested by the foreclosure of a

prior first mortgage. The other line of authority is
33 more recent and is typified by *United States* v. *Boyd*, 5 Cir., 246 F.2d 477, decided on June 28, 1957. The Boyd case holds that the foreclosure of mortgage under a power of sale extinguishes all liens subordinate of record to the mortgage and specifically in that case, an unpaid Federal tax lien.

In my opinion, the Metropolitan and Boyd decisions are irreconcilable. In making this decision, I must choose one or the other as the precedent: It seems to me that the Boyd case, in view of the Court of Appeals decision in the Cless case, presents the logical and reasonable answer to the problem in the instant case. Section 2410 not being mandatory, 26 U.S.C.A. 6323(a) of the 1954 Internal Revenue Code should be given its full effect. It says:

> "(a) Invalidity of lien without notice.—Except as otherwise provided in subsection (c), the lien imposed by Section 6321 shall not be valid as against any mortgage, . . . until notice thereof has been filed . . ."

Section 6321 of the Code gives the United States a lien against the property or rights to property of a person who neglects to pay a tax. Section 6323, however, protects the prior mortgagee. It seems to me that the Metropolitan decision detracts from and dilutes the effect of the recognition given to a mortgage by Section 6323. The logical and reasonable view of the situation appears to be that as set forth in the Boyd case, where the court said:

> "The result is that when a mortgage has been validly foreclosed by a non-judicial sale under a power, it is the consequence of such prior lien and the right of enforcement under it which destroys the junior encumbrance whether it be a private or Federal tax lien. The extinguishment or destruction of the junior lien comes from the nature of the superior lien and not from a later subsequent equity determination (whether under 28 U.S.C.A. § 2410, or Section 7403, or a
> 34 7424 proceeding) that this has been the effect of enforcement of the senior lien. Consequently, when the superior lien has been validly foreclosed, it cut off all junior liens including those of the Govern-

ment. *Trust Company of Texas* v. *U.S.*, D.C.Tex., 3 F.Supp. 683; *U.S.* v. *Ryan*, D.C.Minn., 124 F.Supp. 1, 10, cf. *Minnesota Mutual Life Ins. Co.* v. *U.S.*, D. C. Tex., 47 F.2d 942; *Oden* v. *U.S.*, D.C.La., 33 F.2d 553."

In various articles and decisions on this subject, some of the writers make a distinction or attempt to, as to the property right remaining in a mortgagor after the execution of the mortgage. In Pennsylvania this matter has been settled. See *Brunn* v. *Wichser*, 3 Cir., 75 F.2d 25, where Judge Woolley cites several Pennsylvania decisions, all to the effect that in Pennsylvania the general rule is that a mortgage is a lien only and not an estate; between the mortgagor and the mortgagee, title is in the mortgagee, but as to all other persons, the mortgagor is regarded as the owner and title is in him. The Government lien in the instant case thus fastened upon a title to real property.

In a recent decision of the Court of Appeals, Judge Biggs writing the opinion, *United States* v. *Beaver*, 252 F.2d 486, reiterated the principle that priority to be awarded to United States tax liens is purely a Federal question. He also said, page 489:

"... Since the case of Rankin v. Scott, 1827, 12 Wheat. 177, 6 L.Ed. 592, 25 U.S. 177, 179, wherein Mr. Chief Justice Marshall enunciated the principle 'that a prior lien gives a prior claim, which is entitled to prior satisfaction out of the subject it binds,' the federal rule has been that 'the first in time is the first in right,' U. S. v City of New Britain, 1954, 347 U.S. 81, 85-86, 74 S.Ct. 367, 98 L.Ed. 520 and this is true whether or not the property be after acquired. Glass City Bank of Jeanette, Pa., v. United States, 1945, 326 U.S. 265, 66 S.Ct. 108, 90 L. Ed. 56."

35 It is noticed that the Government sought certiorari to the Supreme Court in the *Boyd* case which was denied on December 11, 1957, No. 503 October Term, Supreme Court, 1957. In searching for authority for the Government's position, I secured and have examined the brief of the Solicitor General of the United States presented in his application for the writ of certiorari. The Solicitor General, it seems to this court, wrote a compre-

hensive and exhaustive brief on the subject under discussion. One of the cases he relied on is *U.S.* v. *Kensington Shipyard & Drydock Corp.*, 3 Cir., 169 F.2d 9, but in that case it is to be noticed that the Government tax lien was the first prior lien on the property and the case is therefore distinguishable on the facts from the *Boyd* case. This court is aware of the rule that a denial of certiorari by the Supreme Court is not an adjudication of the issue presented to that court. But it does seem strange that if the *Boyd* case is not the law, considering the importance of the question and its relation to the collection of Federal taxes, that four of the Supreme Court justices should refuse certiorari. It seems to me, that to give full force and effect to that protection requires a further ruling that on foreclosure of such a mortgage the subordinate tax lien is divested. This carries to its logical conclusion the principles quoted by Judge Biggs in *United States* v. *Beaver*, ". . . that a prior lien gives a prior claim. . . ." and that ". . . the first in time is the first in right."

Judgment will be directed for the defendants.

Order—April 29. 1958

And Now, this 29th day of April, 1958, for the reasons mentioned in the foregoing opinion, the Clerk is directed to enter judgment in favor of the defendants William J. Brosnan, Francis H. Jacob, George H. A. Parkman, Gladys Marie Short Parkman and Mountain Engineering
36 Company, and against plaintiff, the United States of America, and the complaint and civil action are dismissed.

/s/ Joseph P. Willson
United States District Judge

IN UNITED STATES DISTRICT COURT

Notice of Appeal—Filed June 30. 1958

Notice is hereby given that the plaintiff above named hereby appeals to the United States Court of Appeals for the Third Circuit from the final judgment entered in this action signed by the Honorable Joseph P. Willson on

April 29, 1958 and entered on the judgment docket on May 1, 1958.

UNITED STATES OF AMERICA

HUBERT I. TEITELBAUM
United States Attorney

By: /s/ THOMAS J. SHANNON
Assistant United States Attorney

June 30, 1958

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37 **Appendix to Brief for William J. Brosnan and Francis H. Jacob, Appellees—Filed December 12 1958**

[File endorsement omitted]

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39 IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Civil Action No. 15973

UNITED STATES OF AMERICA

VS.

WILLIAM J. BROSNAN and FRANCIS H. JACOB, MARTHA M. BERG, GEORGE H. A. PARKMAN, GLADYS MARIE SHORT PARKMAN and MOUNTAIN ENGINEERING COMPANY

I.

Transcript of Proceedings on Non-Jury Trial—January 22, 1958

Before: HON. JOSEPH P. WILLSON, D. J.
Place: Pittsburgh, Pennsylvania.

Counsel Present:

Robert Coe, Esq., John R. Gavin, Esq., for Government.
William L. Jacob, Esq., Edward P. Good, Esq., for Defendants.

40 MR. GAVIN: May it please the Court, I would like to present at this time Robert Coe of the Tax Division of the Department of Justice, who is here to present

the Government's case. He is a member of the Bar of the State of Virginia.

THE COURT: Glad to have you, Mr. Coe.

MR. COE: Thank you.

THE COURT: Gentlemen, who do we have here for the defendants?

MR. JACOB: Your Honor, I represent William J. Brosnan and Francis H. Jacob.

THE COURT: That is why I made the inquiry, Mr. Jacob.

Colloquy Between Court and Counsel

MR. JACOB: Martha M. Berg is not in this case anymore. Petition was filed in this Court by J. Wray Connolly and this Court made an order dismissing the case as to her. That was presented, I believe, in December of 1957. The order stated that Mrs. Berg has no interest and will claim no interest in the real estate which is the subject matter of this action, and it ordered and decreed that Martha M. Berg be dismissed as a party defendant in this case.

THE COURT: All right, that takes care of her.

MR. GOOD: If the Court please, I represent George and Marie Parkman. We filed an answer admitting all the averments. We have no contest with the Government in regard to this action. Our interest, in fact, coincides with the Government. They were the mortgagor.

THE COURT: What about the Mountain Engineering Company?

41 MR. GOOD: The same is true there. The Mountain Engineering Company was the predecessor of George and Marie.

THE COURT: The contest, then, is between Brosnan and Jacobs and the Government, is that it?

MR. JACOB: That's right.

THE COURT: All right, gentlemen, proceed.

MR. COE: If Your Honor please, the Government has come into this suit to seek alternative remedies. The first one is to effectuate and enforce a statutory right which

is granted the United States as a condition of the waiver of its sovereign immunity under Title 28, United States Code, Section 2410, by which the mortgagees in this action attempted to join the United States as a party on a mortgage foreclosure. In the alternative, the Government would seek a determination that the Court of Common Pleas of Allegheny County in the mortgage foreclosure action did not acquire jurisdiction over the United States, and therefore, the tax liens of the United States are still valid and persisting upon this property involved.

The pleadings which have been filed in this action will show the sequence of events which seems to be undisputed.

THE COURT: What are they? Let's hear those so that we have a record here that shows it without having to dig them out of the complaint and the answer and so on.

MR. COE: There was a bond secured by a mortgage given by the defendants, Mr. and Mrs. Parkman, to one
42 Martha Berg. When the Parkmans defaulted upon payment under the mortgage and bond, a confession of judgment was entered, and on this confession of judgment a right of fieri facias was issued to the sheriff to sell the property involved. After the writ was issued and prior to the sale, the judgment was assigned by Martha Berg to the defendants William Brosnan and Francis Jacob. At the same time or during the same period, a rule to show cause was issued out of the Court of Common Pleas of Allegheny County against the United States to show cause why it should not be made a party defendant in that action to set up asserted tax liens which had appeared of record against all rights belonging to the Parkmans.

During this period, the sale was postponed for a period of sixty days and longer. When the sale was conducted on January 3, 1956, the property involved was sold to William Brosnan and Francis Jacob for the sum of $6,203.23, which amount was applied to costs and taxes.

On the third of January, 1957, within the time allowed by the statute, the United States tendered this amount, the sale price, exercising the right of redemption abiding by the statute and demanding delivery of the deed of the property.

THE COURT: Tendered it to whom?

MR. COE: To William Brosnan in person and also to his attorney, Mr. Jacob, acting for both of them. There will be further evidence as to this tender.

43 This tender was refused on the grounds that it was insufficient. And then the United States commenced this action to enforce the right of redemption.

THE COURT: Let's see, do I understand, Mr. Coe, from what you said the mortgage lien was entered of record ahead of the tax lien in Allegheny County?

MR. COE: Yes, Your Honor, the mortgage lien was prior to our tax liens.

THE COURT: All of your tax liens?

MR. COE: Yes, all of them.

THE COURT: Then the Government, you claim, was not made a party in the foreclosure?

MR. COE: In the alternative, yes, Your Honor, we claim the provision by which this claim, the bond, was reduced to judgment was not a foreclosure procedure contemplated by the United States Code, Section 2410, that it was merely an action for a money judgment, and that an execution sale resulted and not a judicial sale, as the statute provides, and that these two——

THE COURT: They confessed judgment on the bond?

MR. COE: Yes, Your Honor.

THE COURT: Then sold the real estate?

MR. COE: On the writ of fieri facias.

THE COURT: When was the Government made a party to this proceeding, if ever?

MR. COE: Well, the rule to show cause was issued between the time the writ of fieri facias issued to the sheriff

44 and the sale. As I understand the sequence of events that occurred here, after the confession of judgment was entered and the writ of fieri facias issued, the existence of these Federal liens was either discovered or the parties involved decided that they would not be discharged unless the United States were brought into

this action. That was what prompted the delay in the sale and the issuance of the rule to show cause why the United States should not be joined as parties.

THE COURT: Did the Government answer that rule to show cause subject to its jurisdiction there?

MR. COE: The Government did not answer, Your Honor. The rule to show cause—the Government took the position at the time that the action itself was not within the contemplation of the statute and it would not be binding on the United States and they had no duty to appear and defend.

THE COURT: What is the procedure outlined in the Federal statute that the parties shall take in order to divest the Government's liens? This question has come up before.

MR. JACOB: At this stage, I think that Mr. Coe has made a statement here to the Court that he cannot sustain as to what the Government had in mind, because at that time Mr. J. Wray Connolly who represented Mrs. Berg came down here and inquired from Mr. Blair, who was representing the Government, as to what should be done to have these liens discharged, and Mr. Blair gave it to him in writing. And all that information was here right in this Court.

43 THE COURT: Who?

MR. JACOB: Mr. Blair was representing the United States Government. And Mr. Connolly followed the directions given to him by the United States Attorneys office.

THE COURT: The statute sets forth what has to be done.

MR. JACOB: Right, and that was what was done.

THE COURT: To divest the Government of the real estate.

MR. JACOB: And all of that was done. It is a matter of record and Judge Weiss made the final order on December 20, 1955—or '56. I have it all here and I am going to offer that in evidence in due course.

MR. COE: Your Honor, Mr. Jacob has the advantage over me there, in that I was——

MR. JACOB: I have been through this all along.

MR. COE: I have not been in these proceedings here. I presume Mr. Blair was an Assistant U. S. Attorney?

MR. JACOB: Yes.

MR. COE: Here?

MR. JACOB: I don't know.

MR. COE: If he outlined a procedure which he says the United States might be joined, it would not necessarily follow that that was binding upon the United States.

46 THE COURT: In other words, Mr. Blair doesn't have the authority to bind the United States as to what the law is.

MR. COE: But if Your Honor will indulge me a moment, I can quickly cover the points the statute requires.

THE COURT: Let's see that statute. What are you reading?

MR. COE: 28 U.S.C. Section 2410.

THE COURT: We have it. Go ahead, read it.

MR. COE: All right. It says under the conditions prescribed in this section and Section 1444, which pertains to removals of actions to the Federal court from the state courts for protection of the United States, the United States may be named a party in any civil action or suit in any district court, including the District Court for the Territory of Alaska or state court having jurisdiction of the subject matter entitled to or for the foreclosure of a mortgage or other lien on real or personal property. The complaint shall set forth with particularity the nature and interest of the lien of the United States. In actions in state courts service upon the United States shall be made by process of the court with a copy of the complaint upon the United States Attorney for the district in which the action is brought. Then also notice upon the Attorney General in Washington by registered mail.

The United States has sixty days to appear. And it goes further that a judicial sale in such action or suit

shall have the same effect with respect to the dis-
47 charge of liens or encumbrances by the United
States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States shall be made subject to and without disturbing the lien of the United States—that doesn't apply here.

Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem.

That is it in essence. I don't think we have any quarrel in the nature of these proceedings——

THE COURT: You take the position it doesn't make any difference if you are not first—in other words, put it this way, if the liens of the Government are not still on the property, you say then you made a tender in any event, is that it?

MR. COE: If the liens to the Government are not on the property?

THE COURT: Yes.

MR. COE: Yes, sir.

THE COURT: You made a tender in any event under the statute?

MR. COE: If this proceeding——

THE COURT: It was regular on its face?

MR. COE: It was regular on its face, the United States
was properly joined, our liens were divested under
48 the sale. But under the provision of the statute, we
have a year from that to redeem the property from the sale.

THE COURT: You made that tender?

MR. COE: And we made the tender within the proper time.

THE COURT: Is the tender made to the purchaser?

MR. COE: The tender was made to the purchaser.

THE COURT: Is that the correct way to make it?

MR. COE: The statute doesn't say. But in the laws and tradition of rights of redemption after sale, it is to the purchaser who then at the time owns the property. We would have no other place to make it in view of the fact that the title has passed to the purchaser.

THE COURT: All right. We will go ahead with your case.

MR. COE: The point that Mr. Jacob raised about being advised that this was the procedure to follow, it would still not answer the question as to whether the particular action which had been commenced in the Court of Common Pleas of Allegheny County was a foreclosure suit resulting in a judicial sale within the meaning of Section 2410 and which is the alternative.

THE COURT: What other sale would they have up there except that?

MR. JACOB: None.

49 THE COURT: The first paragraph of that section says to quiet title or the foreclosure of other liens. Any kind of lien ahead of the United States that divested a United States lien as I understand it, you make the United States a party and that transfers the lien from the property to the fund in court?

MR. COE: That is quite true. I think the distinction and the point of contention lies in whether this section referred to is an equity foreclosure resulting in a judicial sale as a common equity practice——

THE COURT: I don't know where you practice law, but I think the law of Pennsylvania for a great many years used that section in foreclosing mortgages either mortgage or judgment on confession of the bond to bring the United States in.

MR. COE: I don't know about the United States part. I know that is the common practice to collect on bonds that were secured by mortgages. But the question which we pose, is that a proper foreclosure procedure in which a party has had a chance to appear and defend, set up its liens and hasn't been adjudicated. If I understand the

procedure that was involved here, actually it was a money confession on judgment on which the confession issued.

THE COURT: On the mortgage bond.

MR. COE: On the bond, yes, Your Honor. And that is no different there as I can see on a suit on a contract. You still have a money judgment and you would have execution issued and the sheriff could go out and find any property on which to levy and have his sale.

50 THE COURT: Well, you know, of course, under the law of Pennsylvania that a judgment entered on a mortgage bond takes its lien in accordance with the terms of the mortgage which is given as security. That date of that lien relates back to the date of the bond. You might confess ten years after that bond is given, but your judgment, your lien is determined by the date of your mortgage lien as filed in the office.

MR. COE: That may be true, but I still don't think——

THE COURT: In other words, that is foreclosure of mortgage in Pennsylvania.

MR. COE: It is the procedure followed by Pennsylvania law.

THE COURT: Sure.

MR. COE: But this alternative position we have taken, that is not the type of——

THE COURT: You want the Court to decide something here that I don't believe you will get him to decide because I think that is a mortgage foreclosure under the law. That is my impression of it, Mr. Coe, very frankly. On the other hand, whether or not they subjected the Government to that proceeding in this case, that is different entirely, if they didn't give you sixty days to answer and all that sort of thing. They have to follow that statute in order to divest the Government liens, I will be frank to say that. I think that is a subject here to litigate, to decide.

MR. COE: Well, that as I said is the bone of contention to be decided as you said. Now, if we may perhaps
51 go on to some other point and take these alternative positions.

We will assume for the moment as we did in our pleadings and complaint that we were properly joined and properly subjected to the Court with the sale resulting in the divesting of the Federal liens. But it also leaves us with a one-year right of redemption.

THE COURT: Yes.

MR. COE: And as I stated in the opening facts which are borne out by the pleadings, the background material leading up to the tender which the Government made, at this point, then, I would like to call Mr. Robert Blair to the stand to offer evidence as to the fact of the tender made which would be the prerequisite to the right of redemption.

ROBERT X. BLAIR, called by and on behalf of the Government, being duly sworn, testified as follows:

DIRECT EXAMINATION.

BY MR. COE:

Q. Mr. Blair, would you state your occupation?
A. I am a revenue officer with the Revenue Service.
Q. Which division or section?
A. Collection Division, Delinquent Account Returns Branch.
Q. Office of the District Director?
A. That's correct.
Q. Did you have occasion on or about January 3, 1957, to attempt to contact Francis Jacob?
A. Do we have it right here? Is it '57?
MR. JACOB: That is right
52 A. Well, I did, that is correct.

BY MR. COE:

Q. Did you succeed in contacting him?
A. We didn't succeed in contacting Francis Jacob, no.
Q. Would you state to the court the reason you were attempting to contact him?
A. We were attempting to deliver money to accomplish the redemption of the property.
Q. That was the property involved belonging originally to whom?

A. The property that was originally owned by the Parkmans and sold by the sheriff on January 3 of 1956 to William Brosnan and Francis Jacob.

Q. Did you then attempt to contact William Brosnan?

A. Yes, we did, and we succeeded in contacting him.

Q. What did you do when you contacted him?

A. We notified him of the purpose of our call, gave him the Government check to cover the amount that was bid at the sheriff's sale, pluns interest, and attempted to accomplish redemption of the property.

Q. You tendered him a check?

A. That's right.

Q. Drawn on whom?

A. The check was payable to the District Director of Internal Revenue. It was endorsed in blank by the District Director.

Q. And how did you calculate the amount; what did the amount consist of?

A. The total amount was made up of $6,203.23, which was the amount bid at the sheriff's sale, plus interest, and making the total amount we offered him $6,575.42.

53 Q. What was Mr. Brosnan's answer to your tender?

A. He indicated that he would not accept the check and certainly wouldn't be interested in redemption of the property when so small an amount was offered in the light of the amount he had invested in the property.

Q. Following your contact with Mr. Brosnan, did you make any further effort to contact Francis Jacob, the other purchaser?

A. We did. Mr. Brosnan referred us to William Jacob, his attorney, and we asked that he contact William Jacob and see if we could see him that afternoon, set up an appointment. Mr. Brosnan did that. He set up an appointment for three o'clock in the afternoon. We left Mr. Brosnan's place of business and went back up to the place of business of Francis Jacob, but he was not in.

Q. So at the end of the day you had spoken to Mr. Brosnan and he had refused your tender?

A. That's right.

Q. And you had made one further effort to contact Mr. Jacob?

A. That's right.

Q. And also on that day you were ready, willing and able at all times to deliver this check?

A. That's right.

Q. Drawn on the Treasury of the United States and endorsed—payable to the District Director and endorsed in blank?

A. That's right.

Q. Was it within your knowledge that the date upon which you contacted these people was within one year following the sale of this property?

A. It was.

54 MR. COE: Do you have any questions, Mr. Jacob?

MR. JACOB: Yes.

CROSS-EXAMINATION.

(Letter dated November 29, 1955, produced and marked Defendants' Exhibit 1.)

BY MR. JACOB:

Q. Mr. Blair, the day to which you make reference as having been to see Mr. Brosnan was January 3, 1957?

A. That's right.

Q. Is that right?

A. That's right.

Q. And the sheriff sale was held on January 3, 1956?

A. That's right.

Q. So you waited until the last day that the year would expire?

A. Well, we were in your office——

Q. Wait a minute. Is that true?

A. The day before the last day, the way we calculate it.

Q. You figured you had one day more?

A. That's right.

Q. Did you make any effort on the following day of January 4, 1957, to see Mr. Francis Jacob?

A. No, because you had indicated to us that you would not recommend to your clients that they accept the amount offered.

Q. Yes, because you had offered an inadequate amount, as I told you?

That's right.

55 Q. Yes. But you did not contact him to make any offer?

A. Made no effort to reach him the following day, no.

Q. And you never made any tender to Francis H. Jacob at any time?

A. That is correct. We tried to make it to him, but we weren't successful.

Q. You tried to make it on January 3, 1957?

A. That's right.

Q. And you knew where his place of business was, didn't you?

A. Oh, yes.

Q. Then you had known that for quite some time?

A. Yes. As early as May of 1956 we had notified him that we intended to attempt to redeem the property.

Q. So that from May, 1956, until January 3 of 1957, you knew where his place of business was?

A. That's right.

Q. And at no time between those dates did you contact him or tender to him any money?

A. No, not until our effort on the third of January.

Q. Pardon me?

A. Not until our attempt on the third of January.

Q. I show you here a letter that has been identified as Defendants' Exhibit No. 1. Is that your signature (handed to witness)?

A. That is my signature.

Q. So you did, then, furnish J. Wray Connolly with the information pertaining to the Government's liens against Mountain Engineering Company so that he could include them in the petition to Common Pleas Court to

56 comply with the Federal law leading to the divestiture of those liens?

A. That is my letter. I did not, or I do not recall furnishing him information on the specific liens. As Chief of the Special Procedures Section, we have many calls from attorneys for information how to get around the Federal tax liens, and one of the approaches to the problem is to follow the Internal Revenue Code and request a discharge of the property from the specific liens by filing applications with us. That was one of the avenues that was open and that is what that letter relates to.

Q. And the other avenue was to file their petition in Common Pleas Court——

A. Well, there is two other avenues.

Q. Yes.

A. The one is to join us in on the court action to foreclose under Title 28, Section 2410 of the United States Code. The other avenue is provided in the Internal Revenue Code, I believe it's Section 7425, and it makes provision for the person to request the Government to institute an action to foreclose its liens.

Q. That's right. But the procedure that was followed in this case was the petition filed in the Common Pleas Court and a rule granted and service made on the Government in Washington, D. C. by registered mail, and on John A. DeMay, Jr., Assistant United States Attorney here in Pittsburgh?

A. I am not aware of the service on it. I presume they did that.

Q. Yes. But that is the procedure followed in this case?

A. Yes, that was the procedure.

57

Offers in Evidence

Mr. Jacob: If Your Honor please, we will offer all of these records. I think it would be more in line with our defense rather than on cross-examination of this witness.

Redirect Examination

By Mr. Coe:

Q. Mr. Blair, you say you were employed in Internal Revenue Service?

A. That's right.

Q. And you have no authorization of any fashion to waive any rights of the United States?

A. I have not.

Q. Regardless of what you may write in letters?

A. That's right.

The Court: You don't say you give misinformation in the letter?

A. No.

MR. JACOB: He didn't give out any misinformation, Your Honor. He only did what the duties of his office permit him to do. And any lawyer——

THE COURT: I just made the inquiry.

MR. JACOB: Nothing wrong with what he did.

MR. COE: Oh, I am not saying there is anything wrong, Your Honor. I am saying regardless of what he said——

MR. JACOB: Nothing what he said was wrong either.

BY MR. COE:

Q. At the time that you interviewed counsel for Mr. Brosnan and Mr. Jacob in his office that you stated,
58 was any statement made as to the reason for declining the tender?

A. Mr. Jacob indicated that he didn't consider the amount offered, the amount of money involved even an offer of redemption and he would not recommend his clients even consider it in view of the amount. He indicated he was entirely in agreement that the Government should redeem the property on payment of the right amount, the amount he felt was right.

Q. Did he indicate what he felt might be the right amount?

A. Yes, he did. The figures he gave me that day were in the vicinity of $52,000, and he called the following day to tell me he had made an error in his calculations. He gave me a revised figure of $55,500-some dollars.

Q. I am not so much interested in the exact figure. Did he give any indication as to what these figures constituted?

A. Yes.

Q. Where he got them? What did he say? Itemize them.

A. The amount of the judgment as of June 7, 1955, plus interest on that amount, plus the amount bid at the sheriff's sale, plus the additional costs incurred in connection with getting his title, and the 1956 taxes on the property.

RECROSS-EXAMINATION

BY MR. JACOB:

Q. One other item, Mr. Blair, about the stamps that were put on the deed.

A. Well, I had lumped that into the additional costs involved in getting your deed. There were stamps and
59 the fee for the deed and so forth, all necessary in order to accomplish securing your sheriff's deed.

Q. Yes, but the figure that you quoted here as having been the amount of the check that was shown to Mr. Brosnan did not include the stamps that were required to be put on that deed, did it?

A. We based our amount——

Q. Just answer my question yes or no.

A. No, it didn't.

Q. No, it didn't, that is right.

FURTHER REDIRECT EXAMINATION

BY MR. COE:

Q. But from what you were told, adding the amount of stamps on there wouldn't have made any difference any way?

A. That is right.

MR. COE: That is all.

MR. JACOB: That is all, Mr. Blair.

Colloquy Between Court and Counsel

MR. COE: If Your Honor please, at this time the Government's first alternative has been presented, that the mortgage foreclosure procedures or judgment on the bond with writ of fieri facias was had, sale was held, property purchased, and within the time allowed by the statute, the United States tendered the amount of the sale.

THE COURT: Well, you haven't shown the amount of the sale, yet.

MR. COE: I thought the witness stated it.

60 THE COURT: Did you show the amount brought at the sheriff's sale?

MR. COE: Yes.

THE COURT: Was he there?

MR. COE: He wasn't there, but he stated it was the way they calculated the check.

THE COURT: He said they calculated it that way, but he didn't prove what the property brought at the sale. Maybe he did.

MR. JACOB: I have the sheriff's receipt, Your Honor, for the amount that was paid.

THE COURT: Well, wait a minute. The Government is in its case. You seem to have a different idea from the Government's idea, I would take it from your cross-examination, as to what redeem means. And I had understood from the Government's position here and Mr. Coe to say all the Government had to pay back, tender, was the amount paid to the sheriff at the time of the sale. Now, that is his position, he should prove that so we have that very clearly before the Court and know on what he wants to stand, that is all.

MR. COE: In Paragraph 15 of the answer, defendant Francis H. Jacob, the amount of the sheriff's sale is admitted.

THE COURT: All right. We haven't got anything of the complaint and answer in the record yet. If you say you have completed your case, that is what I understood you to say?

MR COE: It is taken as admitted.

61 THE COURT: You haven't put anything on the record in evidence in the complaint or the answer as yet. You don't have any evidence from the complaint or answer before me, not yet anyway.

MR. COE: Do you have the sheriff's certificate? Would you introduce it to establish that fact?

MR. JACOB: Yes, I will be glad to do that.

MR. COE: I have no objection.

MR. JACOB: It is agreed between counsel for the Government and counsel for the defendants, Francis H. Jacob and William J. Brosnan, that the amount that was paid to the sheriff was $6,608.38 for which the sheriff issued his receipt bearing that date, Serial No. 01553, and I hold the original receipt for the amount that I mentioned.

THE COURT: All right. Receipt was made to whom?

MR. JACOB: Receipt was made to me.

THE COURT: Who paid the money?

MR. JACOB: I did. I paid the money for and on behalf of William J. Brosnan and Francis H. Jacob. It was their money. And that is the amount mentioned in paragraph 15 of the answer to which Mr. Coe made reference.

THE COURT: Which you admit?

MR. JACOB: That's right.

THE COURT: All right, we will consider that in evidence.

MR. COE: In order to pass on to the argument on this point, it has been established as to the tender and
62 refusal thereof. If I may say, I think that the question turns on what is a right of redemption, and it is the Government's position that a right of redemption after a sale is a right to redeem from the sale at the sale price and nothing more. If I may anticipate counsel from the evidence that has been produced, it seems that the redemption would mean to him paying off the prior claims in its entirety. The statute itself makes no reference to defining a right of redemption. It merely says the United States shall have one year from the sale within which to redeem the property. And the history of the word——

THE COURT: We are not arguing the case.

MR. COE: Your Honor?

THE COURT: We are not arguing the case, we are taking the evidence.

MR. COE: I am just establishing this one point——

THE COURT: We haven't heard the defendant on that point.

MR. COE: That is the Government's position.

THE COURT: Have you put in all the evidence you want to put in on this side of the case?

MR. COE: Yes, we have, Your Honor.

THE COURT: All right. I think you better take up the next proposition and try the whole case at one time. Take up your next proposition, Mr. Coe.

MR. COE: All right. If Your Honor please, there is a point which has come to our attention that is not in our file. I would like a five minute recess to clear up this
63 thing in order to go on with the second section of the Government's claim.

THE COURT: All right, we will recess for ten minutes.

(Whereupon the Court recessed.)

After Recess

Offers in Evidence

MR. COE: If it please the Court, the second section of the Government's case involves the sufficiency of the procedures that were had in the Court of Common Pleas of Allegheny County to meet the requirements of the statute waiving sovereign immunity and subjecting the United States to the jurisdiction of the Court of Common Pleas.

I would like to mark this as Exhibit 1.

(Two appearance dockets produced and marked Government's Exhibits 1 and 2, respectively.)

MR. COE: I offer in evidence certified copies of the docket entries from the Court of Common Pleas of Allegheny County, T.D.S.B. Docket, which will set forth the procedure and the facts involved in the confession of judgment which was entered against the Parkmans, and the fact of the assignment of the judgment to Mr. Brosnan and Mr. Jacob.

THE COURT: Any objection, Mr. Jacob?

MR. JACOB: No, Your Honor. Right in connection with that, so that the sequence may be reserved, I would by agreement of counsel like to offer with that the
64 petition to join the United States of America as an additional defendant.

MR. COE: I think that would come after this one.

MR. JACOB: Is that the next one?

MR. COE: Yes.

MR. JACOB: All right, put that in.

MR. COE: And as Government's Exhibit No. 1 has entries for the execution docket for the Court of Common Pleas of Allegheny County, certified copy, it will list the sequence of events of the writ of fieri facias, including the tax liens, issuance of the rule to show cause, petition to join the United States, which Mr. Jacob will give actual copies of.

(Assignment of mortgage produced and marked Defendants' Exhibit 2.)

Colloquy Between Court and Counsel

THE COURT: Gentlemen, I take it from this there was judgment on the bond filed in the Common Pleas Court on June 7, 1955. Is that right?

MR. JACOB: That's right.

MR. COE: There is one particular fact that the Government would like to point out contained in its two exhibits, the amount on the sheriff's return from the execution sale differs from the amount upon the receipt which Mr. Jacob introduced into evidence, and it was based——

THE COURT: Wait just a moment. I want to look at No. 2 so I can get this thing straight. The fieri facias on the judgment confessed on the mortgage bond was
65 issued when? When was that issued, Mr. Coe?

MR. COE: I don't have that date right here. June 7, 1955.

THE COURT: Same date that the judgment was entered, is that it?

MR. COE: Yes, June 7, '55, same date as the confession of judgment was entered.

THE COURT: Then I take it, Mr. Jacob, there were two continuances, and on September 22, 1955, petition was presented in open court and the rule was granted on the United States and upon the two Parkmans why the United States should not be made a party to this proceeding?

MR. JACOB: That's right, Your Honor. And I have that petition in its entirety here together with the order of court.

THE COURT: Wait just a moment. October 6, affidavits of service of petition by registered mail on defendants and on Attorney General of the United States of America filed. There was a return of service on September 28, served on the United States of America as additional party at their place of business, Federal Building, Grant Street, Pittsburgh, Pennsylvania, by handing to John A. DeMay, Jr., Assistant U. S. Attorney in charge thereof for the time being, a true and correct copy of the within petition and rule making known to him the contents thereof.

What does the statute say, so that we can see if we have the right service or not?

66 MR. COE: That is the right service, Your Honor.

THE COURT: You concede that is the right service?

MR. COE: I think it did show it was by registered mail on the Attorney General.

THE COURT: And service on the Assistant United States Attorney locally.

MR. COE: Yes, sir.

MR. JACOB: That's right.

THE COURT: And I take it, then, that there was no answer by the United States, Mr. Jacob?

MR. JACOB: That is right.

THE COURT: No answer by the United States. So on December 5, you had your rule made absolute——

MR. JACOB: No, Your Honor, on December 20, 1955, we had the rule made absolute.

THE COURT: On December 5, on motions sale postponed to first Monday of January, 1956. I see, yes.

MR. JACOB: That's right.

THE COURT: And on December 20, you had your rule made absolute.

MR. JACOB: That's right.

THE COURT: The docket entry is that the United States is "hereby joined as a party defendant to the end that taxes due the United States of America enumerated in said petition and the tax lien in favor of United States of America subsequently filed October 13, 1955, in
67 Prothonotary Office of Allegheny County at No. 13623, being additional income tax for the year 1948, 1949, 1950, in the amount of $9,767.68 against said George Parkman, Jr. and Marie Parkman shall be divested," and so on.

MR. JACOB: That's right.

THE COURT: Is that the only taxes we are talking about, the taxes at that time against George Parkman?

MR. JACOB: That's right.

THE COURT: Mr. Coe?

MR. COE: Yes, sir, and Marie Parkman.

THE COURT: Well, yes, both Parkmans.

MR. COE: And the petition also alleges taxes against Mountain Engineering Company, a corporation, controlled by the Parkmans.

MR. JACOB: If Your Honor please, in that connection the order of court stated that the taxes due the United States of America enumerated in said petition and the tax lien in favor of the United States of America subsequently filed October 3, 1955, in the Prothonotary's Office at that number, being additional income tax for the years '48, '49 and '50 in the amounts of 9767.68 against George Parkman, Jr.,

and Marie Parkman shall be divested by the sale of real estate described in said petition being made by the sheriff of Allegheny County, Pennsylvania, January 3, 1956, after which sale the said real estate so sold shall be free and clear of all liens.

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Offers in Evidence

And in connection with the offer that the Government made, I wanted to offer in evidence the petition referred to in that transcript and the order of court thereon dated December 20, 1955.

(Petition and order of court produced and marked Defendants' Exhibit No. 3.)

Colloquy Between Court and Counsel

THE COURT: Do you contend that that procedure take by the attorneys here, Mr. Coe, was not in compliance with 2410?

MR. COE: We contend that the entire procedure, Your Honor, is not—at least I think you are referring to the service requirements?

THE COURT: The whole procedure.

MR. COE: Yes, we do.

THE COURT: Why do you? Where is the defect?

MR. COE: We admit that the service requirement was met, we admit the petition was served upon us and contains the interest of the United States with particularity, which is one of the requirements. But the third requirement of the statute is that there be a judicial sale to divest the Federal liens. And we maintain there has been no such judicial sale.

THE COURT: What do you call a judicial sale?

MR. COE: Sale by order of court, by direction of the court and returnable to the court. A sale which was had here was an execution sale pursuant to writ of fieri facias, which the sheriff made the same subject to no confirmation, the Court had no control over it, no control over the distribution of the proceeds. Even if, as the rule to

69 show cause was that the United States be made a party defendant, and if we failed to answer, which we obviously did not do and we were made a party defend-

ant, we still never had an opportunity to litigate our liens because no money was ever returned to the Court, no opportunity was given to set up priorities. And under the procedure established here there is no opportunity given, the follow up of an execution sale in Pennsylvania law, the sheriff just distributes the money according to the lien list which are prepared by the attorneys for the mortgagee submitted to him, which does not meet the requirement that the Court take under its control the conduct of the sale and the distribution of the proceeds.

And by the very wording of the statute, only the judicial sale itself divests the liens and not an order of court.

THE COURT: Do you have Pennsylvania authority on that, Federal authority?

MR. COE: On which?

THE COURT: On the subject you are talking about?

MR. COE: Yes, I do, Your Honor.

THE COURT: Your foreclosure sale is not a judicial sale.

MR. COE: An execution sale. I have general authority on it. We would like an opportunity to submit a brief in which we would specify separate cases on the subject. We also have Federal authority to the effect that a foreclosure proceeding which does not result in a judicial sale, such a strict foreclosure does not meet the requirements of the statute. It was a New Jersey district court decision——

THE COURT: Well, your point is, as I understand it, that because you didn't answer, thus indicating to the Court that there be no contest on the point, nothing to litigate, the Court simply directed them to go ahead with the sale as originally started. If you had answered and said Yes, you wanted the liens protected, that would have given the Court an opportunity to draw an order directing the proper sale and return made to him. Not having filed any answer whatsoever, not having done anything, not having appeared, having ignored the whole thing, does the Court then have to go about and go through an empty process in order to divest the liens of the Government, or can it go ahead and say the Government is not interested, go ahead with the sale, they had an opportunity. The main instrumentality there is notice. The purpose of it is notice to the Government, give opportunity to the Government to

come in, and as you say contest the liens and the right of distribution before the Court.

MR. COE: But there is no way to contest the right. If we had answered in this particular case under the procedures evolved, these execution sales, we would have answered—this is speculation, of course, not having done so—all we would have done was set up our liens. We would have admitted jurisdiction. And the sheriff would still have gone ahead with his sale, because that was under the right of the fieri facias——

71 THE COURT: You still had the opportunity to come in and contest the sheriff's distribution.

MR. COE: After it was made?

THE COURT: Sure, after the sale. He doesn't make distribution at once. Isn't there an opportunity in the county court to contest the sheriff's distribution of the fund?

MR. JACOB: Oh, yes, Your Honor, and Mr. Coe stated there was no confirmation of the sale. There definitely was and it must of necessity be in every sheriff's sale.

THE COURT: The sheriff makes a return?

MR. JACOB: For the past forty-two years that Leonard McMillin has been with the sheriff's office, we have never had an instance where there hasn't been sales that conform to the procedure followed here where there is a Government lien. We have followed it to the letter of the law right straight down the line. And I think Mr. McMillin was down this morning and told Mr. Coe, gave him all that information.

THE COURT: That has been the practice in Allegheny County.

MR. JACOB: That has been the practice all the time.

THE COURT: Confess the judgment first——

MR. JACOB: Then issue your execution.

THE COURT: Then make the government a party.

72 MR. JACOB: Yes. Then you bring the Government in just like they did here. They can stay their proceedings and bring the Government in. The Government has the opportunity to come in and bid on the property and protect themselves. They are a junior lien. And then in order that the Government might have the opportunity of doing that very thing specifically, you give them this notice. That is the very purpose of this notice.

Then in order to make real estate freely salable so that it won't have a cloud over it all the time with these liens, the procedure was adopted here, the statute was enacted wherein and whereby the Government would submit itself to the jurisdiction of the states. But under those conditions, they must be given notice of everything. They have sixty days within which to file an answer and copy of the petition be sent to Washington and to the District Attorney here in this District. What more could you do? I don't know. There isn't anything more.

We have done all of that. And certainly this court isn't going to set aside the practice that has been going on here since Pennsylvania was a state. We inherited our laws from England, and this was the procedure that has been adopted from time immemorial on a foreclosure of a mortgage, one of the oldest type of real estate procedures that we have.

THE COURT: Of course, what Mr. Coe is hanging his hat on now is the words "judicial sale." Is that right?

MR. COE: That is right.

73 THE COURT: I take it the Government admits the procedure outlined, failure to answer and all that sort of thing, but you just simply say that it was not a judicial sale.

MR. COE: I think, as I stated before and as Your Honor has put it, these requirements to bring the Government into one of these suits, and unless the procedure that the state has meets these requirements——

THE COURT: I am trying to find out what you are kicking about, what you are contesting. As I understand it, the only point you raise relates to the words "judicial sale" in the statute, admitting everything that the people did, and it is still not a judicial sale.

MR. COE: As I understand Pennsylvania procedure, after the sale is held and after the lien lists are submitted, the liens aren't even submitted to the sheriff until after the sale is held. Then he makes his return which allows the Prothonotary's office ten days as I understand it.

MR. JACOB: That's right, for exceptions to be filed.

MR. COE: For exceptions to be filed, which puts a burden upon any entity, particularly of the United States, to

have to trot down to the Prothonotary's office and look it up. We maintain that is not the proceeding.

THE COURT: It is a question of whether they should come to you or whether you should go to them. Is that what you are saying?

74 MR. COE: That gets down to a simpler matter. It is a difficult problem in order to take this general Federal statute which has to be applied uniformly throughout the Union and adapt it——

THE COURT: What you are asking me to do is upset forty years of title companies and the companies may have——

MR. JACOB: It would create such confusion we would have nothing here.

MR. COE: Well, we have a uniform procedure in Massachusetts never joining these sales because they have nothing like a judicial sale——

THE COURT: Well, many states have no such thing. Pennsylvania is one of the few that has confession of judgment.

MR. COE: True.

THE COURT: We have confession of judgment in the Federal court. Judgments are confessed down here in our courts. We have nothing against a judgment. Because it is based on a confession rather than statute, it says a complaint must be served upon the government. I think a complaint is simply a pleading and doesn't make much difference, the way I view it, whether it is a formal complaint or rule to show cause or petition or what it is.

MR. COE: We will go along with that. But it gets down, does the preceeding in its entirety, the culminating factor make a judicial sale which provides money and which all of us have to look to satisfy our claims, if there is enough? But under these proceedings, it is not a judicial sale.

75 THE COURT: To go along with you, with the Government in this proceeding, requires then, as I see it, that in every instance where there is a Government lien on property with a prior mortgage ahead, prior, you can't foreclose in the usual way in Pennsylvania in accordance with the terms of your instrument. You have to come into court and start a proceeding there under the direction of the court. I have always understood the sheriff's sale on a mortgage where it is confirmed by the court under the

rules of the court, not necessarily brought into the judge for signature, but it is confirmed because no exceptions are filed, is a judicial sale. That is my view of it. I would like to see decisions or authority where that is not a judicial sale. I think it is a judicial sale where you have to sell pursuant to an order of court.

MR. JACOB: That's right.

THE COURT: You don't get that fieri facias except under rule of the court.

MR. COE: I say we can cite general rules if we have permission to file a brief. We will cite specific cases.

THE COURT: Yes.

MR. COE: In Corpus Juris Secundum Three, under executions, an execution sale is to be distinguished from a judicial sale in that execution sale an officer who sells gets the authority by virtue of the execution and is guided in the sale by the law rather than the court, where in a judicial sale the court controls. Executions usually require no confirmation. Execution is based on judgment for a sum of money, while judicial sale rests on an order to sell a specific property. In an execution sale, the sheriff is
76 the real vendor, in the judicial sale the court is.

The line is drawn quite clearly.

THE COURT: Under what you have right there, part of it is in Pennsylvania and part not.

MR. COE: True. In fact, as we understand it, even the property involved to be sold under the writ of fieri facias is determined by the attorney who hands it to the sheriff. The writ of fieri facias doesn't even list property. And the attorney furnishes him the list of the property to be sold which, as I would understand the proceeding and talking with Mr. McMillin this morning, he is not even bound to take on the mortgage property unless it is limited in the judgment and bond. But the decree of the court contains no reference to the property.

THE COURT: Of course, we had a decree of the court here directing sale to proceed, delaying the sale and then directing it to proceed.

MR. COE: And also, as I understand the Pennsylvania procedure that this particular business of notice to the United States was adapted merely to try to meet the requirements of the Federal law and has no sanction in

Pennsylvania law. It is not a proceeding which any other creditor would be entitled to.

THE COURT: I think that is true.

MR. COE: And we submit again that in trying to apply this law universally throughout the Union, the fact that one state's longstanding procedure conflicts with it is no ground to change the Federal law, because——

77 THE COURT: Wait a minute. The Federal Government recognizes state practice in this regard. Of course, it is a Federal question whether or not it complies with the Federal statute. So we don't advocate our function by saying if Judge Weiss says it's so, it is so. I am not saying that. I don't do that. It is a Federal question whether or not the state practice is in conformity to this statute, proper notice and so on.

MR. COE: We can't change the state practice, but unless it conforms, we are not bound by it and they are no worse off than before the enactment of the statute itself.

THE COURT: My view at present would be that that is a foreclosure sale on the bond and mortgage, and I think the practice here that is shown by this record indicates sufficient compliance with this section, except, if of course it is not under Federal decisions not a judicial sale, that is a different proposition. I am surprised that it isn't. Maybe it isn't. I am very often surprised on what the law is.

MR. COE: Well, that completes our case.

THE COURT: Then there is no dispute really about the facts.

You have completed your case, I take it, Mr. Coe?

MR. COE: Yes, Your Honor, we have completed it.

Defendants' Motion to Dismiss the Petition of the Government

MR. JACOB: At this time, Your Honor, I would move to have the petition of the Government dismissed for the reason that the allegations of the complaint have not

78 been proven and that no tender has been made; first of all, that the record offered into evidence here shows that the two defendants are the owners of the real estate in question as tenants in common and that no tender at all or no offer was made to the one defendant, namely, Francis H. Jacob. And further that the amount of the

check was shown to William J. Brosnan was not the amount that the law requires to enable the Government to exercise its right of redemption. It is our contention under the Pennsylvania law that for the Government to redeem they would have to make the owners whole and would have to tender them the amount of their judgment with interest and costs and the taxes which they paid.

THE COURT: Well, now, Mr. Jacob, it is like a tax sale, isn't it? They just take away that which has been held and leave you people with your bargains, leave the situation in status quo, isn't it?

MR JACOB: Yes.

THE COURT: That isn't your idea of redemption?

MR. JACOB: No, sir, that is equivalent—it is more vicious than that—that redemption is equivalent to another purchase. Just think of what could have happened in this case. They tender us less than the amount—this is only argument—they made no valid tender at all. But they offered an amount even less than what we paid the sheriff to get the deed. Then if they—let's say that they prevailed and got the title to the property for that small amount. We have lost $49,000. They would pay us around $6,000 and we had in the property $55,591.28. And there is no
79 procedure wherein and whereby we could ever get our money back from the Government. It had taken the property over.

THE COURT: Isn't the public sale price established on the sale under your theory that it is a property worth $50,000 and goes for six as the figure they are talking about?

MR. JACOB: No, Your Honor. It has been the custom and practice of the sheriff of all of the counties, particularly Allegheny County in the State of Pennsylvania, that your first bid is a nominal bid of your costs and taxes. If there is any other bid, then you immediately go up, or go up to the amount of your debt and your interest and your costs and your taxes. And if the Government had come in and bid on that property, then we would have paid $55,591.28. If they had paid $56,000, if they had bid $55,591.28, they would have had the property and they would have had our money out of it and they would have

had the property. Then they could hold the property and sell it to any person else to liquidate their liens for taxes.

THE COURT: What was the amount of the check tendered?

MR. JACOB: The amount of the check was——

THE COURT: Or offered?

MR. JACOB: The amount that was just offered was $6,575.42. And mind you, that was just a check shown, and I will have it in evidence here to show how that was presented to Mr. Brosnan. And it is our further contention that if you have property owned by tenants in common, you have to deal with each as an individual owner.

THE COURT: That isn't necessarily the proposition, is it? That is salable, that interest is salable, subject to liens and so on, an undivided half interest.

MR. JACOB: Yes, that is exactly right. They are tenants in common, therefore, you have to deal with them——

THE COURT: You can tender to one for that half.

MR. JACOB: No.

THE COURT: Can't this case wind up with having a sale on Mr. Brosnan's share and not the other?

MR. JACOB: I don't think so.

THE COURT: Suppose there is a tender as to one? I can see where there would be a tender as to one and not the other.

MR. JACOB: They were intending all the way through and I think they still contend their petition states that they were intending to get back the whole property, not an undivided one-half interest. They never attempted that.

THE COURT: That wouldn't have made any difference if they made a tender, they made a tender, I am not sure about that, but I just raised that question.

Well, you asked to have it dismissed. I am going to refuse that motion. I want to hear the plaintiff on the case.

MR. JACOB: Yes.

THE COURT: Go ahead.

MR. JACOB: You will grant me an exception, of course?

THE COURT: Yes.

MR. JACOB: Mr. Brosnan.

WILLIAM J. BROSNAN, called as a witness by and on behalf of defendants, having been duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JACOB:

Q. What is your name?
A. William J. Brosnan.
Q. Where do you live?
A. 143 South Dallas Avenue.
Q. Where is that?
A. What's that?
Q. Pittsburgh?
A. Yes, sure, Pittsburgh.
Q. And what is your business?
A. A jeweler.
Q. And where is your place of business?
A. 606 Homewood Avenue.
Q. Pittsburgh, Pennsylvania?
A. That's right.
Q. And how long have you been a resident of Allegheny County, Pennsylvania?
A. Thirty-five years.
Q. You and Francis Jacob are the owners of this property that is the subject of these proceedings?
A. That's right.
82 Q. And on January 3, 1957, do you recall when Mr. Blair came to your place of business?
A. I do.
Q. And did he offer you any money; did he offer you any money?
A. No.
Q. What did he show you?
A. He had a check that he showed me that was made out to the Internal Revenue, and he showed me where it was endorsed in blank, told me for the amount that it was, and he said it was in payment for the property. So I immediately told him that it wasn't enough, it wasn't even what we had paid the sheriff. And he didn't know the exact amount—if he wanted to get in touch with my attorney he could find the right figures.

MR. JACOB: Cross-examine.

By Mr. Coe:

Q. One thing, Mr. Brosnan. Based on your answers to Mr. Blair, do you think that he was acting right when he didn't run out and cash the check and bring back $6,500——

A. I didn't question that at all.

Q. It wouldn't have made any difference if he had offered $6,000 in cash?

A. No.

Q. He gave you a Government check. He was prepared to give you a Government check, is that it?

A. I didn't question the check at all; only the
83 amount.

Redirect Examination

By Mr. Jacob:

Q. Did he give you the check?

A. No, he didn't. He had the check laying on the counter and he did turn it over for me to see.

The Court: Did he hand it to you and say here——

A. No, I didn't have the check in my hands at all.

By Mr. Jacob:

Q. What did you say? You were talking when the Court was talking.

A. I didn't have the check in my hands at all. He turned it over to me to see the endorsement.

The Court: What did he say? I didn't understand quite what he said.

A. Well, he said that he was representing the Government on this case and he had a check for me for the amount of $6200. I don't know the exact amount. But I said to him, "Well, that isn't as much as we paid the sheriff." And I said, "Besides, I have mortgage money there. How am I going to get reimbursed?" Well, he said, "That's up to you."

The Court: Well, did he say the fund was yours alone or did he say that was to be divided between you and Mr. Jacob or what?

A. He didn't specify.

The Court: Didn't say anything about it?

A. No.

Mr. Jacob: That's all.

84 FRANCIS H. JACOB, called as a witness by and on behalf of defendants, being duly sworn, testified as follows:

DIRECT EXAMINATION

BY MR. JACOB:

Q. What is your name?
A. Francis H. Jacob.
Q. And where do you live?
A. 3511 Laketon Road, Penn Hills.
Q. Is that in Allegheny County, Pennsylvania?
A. Allegheny County.
Q. And what is your business?
A. I am a realtor, real estate, general real estate business.
Q. With what company?
A. The T. E. Clinton Company.
Q. Where is that?
A. 718 North Homewood Avenue, East End.
Q. Is that a corporation?
A. That is a corporation.
Q. And what office do you hold?
A. I am president of the corporation.
Q. And how long have you been associated with the T. E. Clinton Company?
A. Oh, over thirty years.
Q. And where is the T. E. Clinton Company's place of business located?
A. Main office is 718 North Homewood Avenue, East End section of the City.
Q. Where is the other office?
A. Penn Township on Laketon Road, 3511 Laketon Road.

85 Q. How long has the office of the T. E. Clinton Company been at 718 Homewood Avenue, Pittsburgh, Pennsylvania?
A. On Homewood Avenue, roughly about thirty years on Homewood Avenue at that address.
Q. Was any tender ever made to you by the Government—strike that. Are you and William J. Brosnan the owners of the property in question here as tenants in common?
A. Yes.

Q. And you acquired that——

A. We acquired that property as a joint venture.

Q. You acquired title of the property through the sheriff's sale we have been discussing here?

A. That is correct.

Q. And has the United States Government or any person acting for or on behalf of the Government at any time made a tender to you of any money with a view toward redeeming this property?

A. No, I have never been contacted by the Government or any of their representatives.

MR. JACOB: Cross-examine.

CROSS-EXAMINATION

BY MR. COE:

Q. Mr. Jacob, were you aware at any time that the United States Government was contemplating redemption of this property after you had purchased it?

A. No.

Q. You had no knowledge in any shape, form or fashion——

A. Well, I had an idea back in, oh, I think it was about maybe a year prior to that that the Government
86 may—nothing definite—make an attempt to exercise their right of redemption.

MR. COE: Thank you.

REDIRECT EXAMINATION

BY MR. JACOB:

Q. What was the amount that you and Mr. Brosnan had invested in this property on January 3, 1957?

A. $55,591.28.

Q. And how was that broken down?

A. Well, the debt at D.S.B. was $43,142, interest from 6-1—June of 1955 to January 3, '57, $4112.11——

THE COURT: That is mortgage debt, isn't it, the first D.S.B., that is a mortgage debt?

A. That's right, that is judgment.

THE COURT: Well, that is based on the mortgage as I understand it, that is where the indebtedness arises?

A. That's right.

THE COURT: All right.

A. Then interest on that from June 1 of 1955 to January 3, of '57, amounting to $4112.11. Then costs paid at the sheriff's sale amounting to $668.38. Then we figured interest from January 3 of '56 amounting to $396.50, and taxes, 1956, amounting to $1340.29. The total sum amounted to $55,591.28.

BY MR. JACOB:

Q. That was the amount as of January 3, 1957?

A. That is correct.

87 BY THE COURT:

Q. Is your name in the telephone directory of the City of Pittsburgh?

A. Yes, sir.

Q. At that address where you live now?

A. Yes, sir.

Q. How long has it been in the directory?

A. I have always had a phone.

Q. Have you been there the last seven or eight years?

A. Yes.

Q. Four years?

A. That address I have been there for the last six years. And at my office, why, it's been over thirty years.

Q. Does the telephone directory list your place of business under your personal name?

A. It lists our place of business, then also a listing of the personnel in connection with the corporation.

Q. So that your name is under the corporate listing?

A. That is correct, as well as our salesmen.

THE COURT: That is all I have gentlemen.

MR. JACOB: That is all.

RECROSS-EXAMINATION

BY MR. COE:

Q. If I may ask one more question. To the best of your knowledge, were you in the City of Pittsburgh on the third of January, 1957?

A. Yes, sir, I was.

Q. Either at your office or your home?

A. Beg pardon?

88 Q. Either at your office or your home sometime during that day, the business day?

A. Oh, yes. I am in and out. I am in and out of my office. Our office is in the eastern section of the City, and there are many, many times when I am out in the eastern section, eastern vicinity, and naturally I can't be out there and back in the office at the same time. We service property in Monroeville and out through the eastern boroughs. And I travel in-between both offices. As far as I know, I was in the City and I was available. I was not unavailable.

Q. You stated in answer to an earlier question that I asked you that you were aware or had some knowledge that the Internal Revenue Service was contemplating redemption of this property for a period of time before this particular day. Did you at any time prior to that discuss this matter with your attorney?

A. No, not particularly.

Q. Well, you mean not particularly——

A. Well, frankly, I didn't pay too much attention to it. I had heard a rumor or hearsay that the Government may exercise—may come in at the end of the year and exercise the right of redemption, and if they would exercise the right of redemption I know there wouldn't be a thing that I would be able to do to stop it.

Q. You didn't discuss it in any way with your attorney, how much should be paid or what you considered or he considered the right of redemption to be? In other words, you had a substantial investment in this property——

A. I just naturally assumed the United States Government, being the United States Government, wouldn't come

in and try to rob an individual of moneys he had
89 invested and try to divest his interest. My answer to that would be no as far as the amount was concerned. I just assumed.

Q. But you never discussed it with him in detail?

A. In detail I would say no.

Q. You never gave him any authority of any sort to speak for you?

A. No, sir.

Q. Did you appear personally at this sale?

A. Yes, sir.

Q. Did you make the bid in person?

A. Yes, sir.

Q. You made a bid, then, of some $6,000 for property worth some $50,000?

A. Now wait a minute. You know better than that.

THE COURT: That is argument.

A. We bought a judgment, purchased that mortgage.

THE COURT: You are arguing with the witness.

MR. COE: No, Your Honor, I just asked him if he made the bid, some knowledge of its value.

THE COURT: You put two questions in one, the $6,000 and the $50,000. That is starting an argument.

MR. COE: I will strike the question, then, both of them. Let me rephrase it.

BY MR. COE:

Q. You did make the bid of $6,000 or concurred in the bid for $6,000-some odd dollars?

A. That is correct.

Q. And at the time you made the bid, you had
90 knowledge that the property was worth substantially in excess of that amount?

A. At the time I made—at the time the bid was made, I naturally knew that the property was worth more than the $6,000, because we had already had with that $6,000 in there $55,000 of our own money.

Q. Having put the bid in, were you aware that the United States had a right to redeem that property?

A. Yes.

MR. COE: No further questions.

MR. GOOD: May I ask a question?

THE COURT: I thought you were out of it? You admitted liability. I don't think you can ask any questions. You admitted you have no controversy.

MR. GOOD: That is correct, I have no controversy with the plaintiff, Your Honor.

THE COURT: Well, how do you get in on the side of the Government or any place?

MR. GOOD: Your Honor, I am in as counsel for the defendant.

THE COURT: You don't contest anything, as I understand it. You told me you were with the Government.

MR. GOOD: That we do not contest any of the allegations of the complaint.

THE COURT: You made the statement that you were on the Government's side.

MR. GOOD: That is correct, Your Honor.

91 THE COURT: The Government has examined the witness, so I think the Government is acting for you. I am sorry to say that, but that is your own position.

MR. GOOD: Very well, Your Honor.

Offer in Evidence

MR. JACOB: If Your Honor please, in further connection with the defense of this case I would like to offer in evidence the proceedings at No. 109 July Term, 1957, in the Common Pleas Court of Allegheny County, Pennsylvania, which proceedings briefly were——

THE COURT: You better have them numbered so we know what papers you are talking about. Have them marked as an exhibit.

(Complaint produced and marked Defendants' Exhibit No. 4.)

MR. JACOB: I would like to offer Exhibit 4, being a complaint that was filed by George H. A. Parkman and Gladys Marie Short Parkman, his wife, against William J. Brosnan and Francis H. Jacob, being In Equity, wherein and whereby the Parkmans contested the validity of the sheriff's sale, and our Common Pleas Court, after hearing arguments on the matter, dismissed this complaint and by order of court affirmed title into these two defendants, William J. Brosnan and Francis H. Jacob.

And if the Court please, I will furnish the Court with a certified copy of that final order of court so that the Court would then have the matter completely in front of it.

92 In addition to that, I would also like to offer in evidence——

MR. COE: If Your Honor please, I would like to take one of these exhibits—I would like to take these exhibits one at a time unless they are all connected together, and ask Mr. Jacob what the purpose of bringing them in, these collateral proceedings?

MR. JACOB: It is to show to the Court that an attack was made on the sheriff's sale by the Parkmans and that throughout this whole proceeding they have acted as if the Government was behind them on this whole case. And furthermore, I would like to state on the record that I have been informed that a deposit of money was made with the Government looking forward to the Government redeeming this property and then turning it over or selling it to another prospective purchaser. And it is my contention that that is an improper procedure.

Now, I am prepared to call Mr. Blair, if he is here in the courtroom, if he isn't, then I can call Mr. Good, he knows the facts about that angle of it.

THE COURT: Well, you are in your case, you can call anybody you want to call. I don't hear any objection at this point.

MR. JACOB: Mr. Blair.

ROBERT X. BLAIR, recalled by defendants, testified as follows:

DIRECT EXAMINATION.

BY MR. JACOB:

Q. Mr. Blair, would you state whether or not there
93 is a deposit of funds made with the United States Government in connection with this property that was foreclosed?

A. We have had deposits at different times, persons who would be interested in bidding for the property in case we exercised our right of redemption.

Q. And how much was the deposit?

A. We have had different amounts. One person came up with $7,000, another person came up with $40,000. There have been different offers.

Q. And who made the $40,000 deposit?

A. A man by the name of Spohn.

Q. And who brought him to your office?

A. Mr. Parkman introduced me to him.

Q. And the purpose of having that deposit made was that if the Government got this property back from Brosnan and Jacob, then they would sell it to this man that the Parkmans brought in?

A. The purpose of attempting——

Colloquy Between Court and Counsel

MR. COE: I would object to that.

MR. JACOB: What is the reason?

MR. COE: What are you driving at? This is entirely collateral.

MR. JACOB: It may be. But it strikes me that nobody should ever attempt to use the tremendous power behind the United States Government for individual purposes. And that is what I think has been done here to harass these two defendants. I also want to show and will show by this subsequent proceeding that it was necessary for us to institute quiet title proceedings to have the Parkmans ousted from the property. Not only did they not pay the
94 Federal taxes, they never paid rent to us and we couldn't levy on anything they had because the furniture that they had in there was even on a lease.

Now, here we have on the other hand taxpayers——

THE COURT: Well, now, Mr. Jacob, the point is, I take it even a redemption doesn't give the Government title, does it? Suppose the Government redeems this property. What title do they have to sell?

MR. JACOB: They redeem this property, Your Honor. I take it that they take over lock, stock and barrel the property, and we are out.

THE COURT: Under the theory, then, that the sale would divest all liens against the property, the sale is still to your clients?

MR. JACOB: Yes.

THE COURT: And if they redeem it, it doesn't transfer title to the Government, as I understand that redemption,

it just does away—I don't see where they get title. They just restore the status quo.

MR. JACOB: I don't think you can restore status quo because under Pennsylvania law if we don't proceed within six months,——

THE COURT: In other words, they keep their lien intact whatever it was, which is subject to the first mortgage lien.

MR. JACOB: No, our first mortgage lien is gone.

THE COURT: Under your own proceeding?

MR. JACOB: Right. Our first mortgage lien is gone. And we would have no lien any more, because we can't
95 even file for a deficiency judgment because the Pennsylvania law if you don't do that within six months, then you are presumed that the property you took over has the value of the judgment that you had against it.

THE COURT: I still don't see how the redemption puts the title in the United States.

MR. JACOB: Well, frankly, I don't know. But if they redeem, as I understand redemption, you do take over, because if you followed the old equity of redemption, if you don't waive your equity of redemption——

THE COURT: Redemption was the right given in the old days to the property owner.

MR. JACOB: He redeemed.

THE COURT: Now, the Government has the right to redeem, to restore its status of lien by paying off something.

MR. JACOB: They have to make the prior owner whole. That's what we always had to do in equity of redemption under mortgage. If we wanted to redeem, we had to come in and tender the amount of the debt, the interest, the costs and taxes. They didn't see fit to do that.

THE COURT: If you are correct on that, the whole proceeding failed because they admitted they didn't give anywhere near that.

MR. JACOB: Right.

THE COURT: I don't see where it is necessary to go into this proposition. It doesn't seem to me this is going to help us solve the difficulty.

96 MR. JACOB: Probably not.

THE COURT: The Government either does or does not have the right to do things under the act by statute.

If it does, regardless of the harm and fault and all that sort of thing, they can do it. Sometimes we think the Government ought to be magnanimous. It isn't always that way.

MR. JACOB: Oh, no, no. This is off the record, but it was our contention here and it still is that if the Government felt that this property had the great value, they should have come in and bid on it at the sheriff's sale like anybody else.

THE COURT: I don't know what that sentence means in that statute, I am frank to say. We will have to make a decision.

I think this testimony, Mr. Coe, is collateral and I think I will sustain the objection to it.

MR. JACOB: This wasn't just raised by me today, Your Honor. I put it in my answer. Since Your Honor ruled on it, it is agreeable to me.

THE COURT: Yes. You have offered one exhibit here, the complaint, Defendants' Exhibit 4. Do you have any objection to that, Mr. Coe?

MR. COE: The complaint in the so-called——

THE COURT: Equity case.

MR. COE: I have no objection to it, Your Honor. I would like the record to show that we think it is not material. But if he wishes to put it in, we have no objection.

97 MR. JACOB: And I will supplement that with the order of court, Your Honor.

THE COURT: The final order. All right.

MR. JACOB: Will Your Honor bear with me so I can consult with my client and see if there is anything additional?

MR. COE: Mr. Blair, I will call you again as a Government witness with Mr. Jacob's indulgence.

MR. JACOB: Yes.

ROBERT X. BLAIR recalled as a witness by the Government, testified as follows:

DIRECT EXAMINATION.

BY MR. COE:

Q. At the time you stated in your previous testimony that you went into the Brosnan place of business to affect

this tender, did he pick it up while you were in there and presenting this check to him?

A. He had the check in his hands. He turned it over and looked at it, held it for several minutes before he returned it.

MR. COE: Thank you.

BY THE COURT:

Q. You weren't going to give it to him, were you?

A. Yes. In fact, we were preparing to go out and turn it into cash if he raised objections on that.

Q. Were you ready to turn that check over to him without that other man being there?

A. Yes. And we told him we had a man waiting up in the other office attempting to reach Mr. Jacob.

98 Q. You were prepared to give Mr. Brosnan—which one was it, Brosnan?

A. Yes.

Q. You would have given him that check for the whole amount?

A. Um-hum.

Q. What did you want from him in return?

A. Redemption of the property.

Q. Signed by whom, or what do you mean by that? What did you have in mind by redemption?

MR. COE: The redemption that we had in mind——

THE COURT: Wait a minute, I am asking the witness.

MR. COE: I am sorry, Your Honor, you were looking straight at me.

BY THE COURT:

Q. What did you have in mind that you would get in return?

A. Receipt for it acknowledging that we had accomplished redemption on the property.

Q. And you were going to have that signed by him alone, is that it?

A. Yes.

Q. Did you have such a paper prepared?

A. No.

Q. You didn't have a deed prepared then?

A. No.

Q. You were going to write out a receipt that moment?

A. We expected he would write out a receipt and give it to us for the money.

99 Q. You were going to take his receipt. And what did you have in mind how the receipt would be worded?

A. Merely acknowledging the money tendered to accomplish redemption of the property.

Q. What, then, if you would have given him the check, what did you have in mind to do with his co-owner when you met up with him that day, if you met up with him? What purpose did you have in mind there?

A. When we first got into this problem of attempting to redeem the property or become interested in redeeming it, we sent a letter——

Q. That isn't what I asked you. What did you have in mind to do that day if you had given him the check, what would you do with Mr. Jacob?

A. We would have informed Mr. Jacob of our delivering the money to Mr. Brosnan. We had made several attempts to reach Mr. Jacob that day——

Q. Just a moment. I am still asking you, you have already, according to you, stated you would have given the check for the whole amount to one of the tenants in common?

A. That's right.

Q. All you were going to do, then, is tell the other tenant in common that you had given the check to his co-owner?

A. Right.

Q. So you didn't have in mind that day to give Mr. Jacob that check after you were in Brosnan's office?

A. We had intentions of delivering it to whichever one we could contact.

Q. Whichever one you met up with first?

A. That's right. We tried to reach them both.

100 Q. And then you figured your duty was done, is that it?

A. After we had contacted Mr. Brosnan, he referred us to William Jacob, indicating that William Jacob represented both of them on the matter.

THE COURT: All right. Anything further?

MR. COE: No, sir.

THE COURT: All right, step down.

CROSS-EXAMINATION.

BY MR. JACOB:

Q. Mr. Blair, when you came to see me, I specifically informed you, did I not, that I did not represent them and had no authority whatsoever to accept or refuse any check in the nature of a tender. Isn't that right?

A. That is several questions in one. You did not indicate that you didn't represent them. In fact, you indicated you did represent them——

Q. You mean for tender purposes?

A. You indicated you were not authorized to accept the tender.

Q. That's right.

A. And you would not recommend to them that they would accept it.

Q. That's right. In the amount that you mentioned.

A. In the amount offered.

MR. JACOB: That's right. That is all.

THE COURT: All right.

MR. JACOB: That is all I have.

MR. COE: We have nothing further to offer, Your Honor.

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Offer in Evidence

MR. JACOB: Your Honor, by agreement of counsel I am going to offer in evidence Defendants' Exhibit No. 2, which is the original assignment of the mortgage and bond and the judgment.

THE COURT: All right. Does that complete the testimony, gentlemen, the evidence?

MR. JACOB: Yes, Your Honor.

MR. COE: Yes.

THE COURT: I understand now, gentlemen, in the complaint the allegations which you don't deny, you admit, Mr. Jacob, on behalf of your two clients, and that those matters are in evidence?

MR. JACOB: That's right.

THE COURT: You didn't put them in?

MR. COE: Most of them are.

THE COURT: The allegations of the complaint that are undenied, you didn't put them in. I assume they are now in evidence. Any question about any of them?

MR. JACOB: No.

THE COURT: All right, they are in evidence.

How soon do you want to file your briefs? I think you better exchange briefs, then you better have a time for reply briefs. I don't see that this is a very easy question, I am sorry to say.

If that is a judicial sale and the Federal courts have said so, I don't think it is much of a problem. If they say flatly it isn't, I am not sure. I think I understand the procedure, having foreclosed myself a great many
102 mortgages. I understand in a vague way how they do it, and I would be surprised if any court would hold that isn't regular. Maybe it isn't. On the other hand, that tender, Mr. Coe, I am very doubtful about that kind of a tender, the last day.

MR. COE: Is it the day or the method in which it was done?

THE COURT: Both. I think when they say—after all, the Government has to recognize the title there. There are two people.

MR. COE: Well, that is true.

THE COURT: And if they want to wait until the last day, they are stuck with what happens the last day.

MR. COE: Well, we will argue it is substantial tender having gone to one——

THE COURT: For all they knew, Jacob had sold his property the day before. They never contacted him. One fellow can sell an undivided interest any time. I think they were bound to make a tender to both of them. On the other hand, it would seem to me under the law they are separate interests, indivisible interests, each one as a property right. It may be that it is good against one and not the other. Those are the things I want you to brief the Court, if you will.

MR. JACOB: When would you have your brief, Mr. Coe?

MR. COE: Well, let's see——

THE COURT: I think maybe I am going to hear you again orally on this matter. Agree among yourselves, if
103 you will, change your briefs and so on, and we will put the case down for argument during the next argument list, which is March 3. If that is time enough, I will hear you on the afternoon of the 6th of March, Thursday afternoon, two o'clock.

MR. COE: By the first of March?

MR. JACOB: March 6th, he said.

THE COURT: March 6 I would hear you.

MR. COE: Do you want reply briefs or exchange briefs?

THE COURT: Well, it may be if you exchange briefs and we have an argument, maybe you will want to add something after that. So on reconsideration, exchange your briefs in time for March 6.

MR. COE: By the 6th of March.

THE COURT: A couple of days ahead of time at least. I will set it down, enter an order setting this matter for argument on March 6, at two o'clock.

All right, gentlemen.

(Whereupon the proceedings were concluded.)

* * * * * * * * * * *

Reporter's Certificate to foregoing transcript omitted in printing.

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104 **Defendant's Exhibit 3**

II.

IN THE COURT OF COMMON PLEAS OF
ALLEGHENY COUNTY, PENNSYLVANIA

Fi. Fa. No. 521 July Term, 1955

Sur D. S. B. No. 3089 July Term, 1955

Martha M. Berg

v.

George H. A. Parkman and Gladys Marie Short Parkman, his wife

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PETITION TO JOIN UNITED STATES OF AMERICA AS ADDITIONAL PARTY

To the Honorable, the Judges of Said Court:

The Petition of Martha M. Berg, Plaintiff above named, by her attorneys, J. Wray Connolly and Moorhead & Knox, respectfully represents:

1. Martha M. Berg, Plaintiff above named, and J. D. Berg, her husband now deceased, conveyed to George H. A. Parkman, Jr., and Gladys Marie Short Parkman, his wife, Defendants above named, by deed dated January 28, 1948, and recorded in the Office of the Recorder of Deeds of Allegheny County, Pennsylvania, in Deed Book Vol. 2988, page 345, a certain tract of land in Moon Township, Allegheny County, Pennsylvania, consisting of 175 acres, more or less, a description whereof is attached hereto, made a part hereof and marked Exhibit "A".

2. As part of the consideration for this conveyance the above named George H. A. Parkman, Jr., and Gladys Marie Short Parkman made, executed and delivered a purchase money mortgage and accompanying bond to Martha M. Berg and J. D. Berg, her husband now deceased, in the amount of $45,000, which said mortgage is dated January 28, 1948, and is recorded in the Office of the Recorder of Deeds of Allegheny County in Mortgage Book Vol. 2924, page 48.

3. The Defendants having defaulted in payments of principal and interest due pursuant to the terms of said mortgage, Martha M. Berg, Plaintiff above named, caused to be entered on June 7, 1955, judgment pro confesso at D. S. B. No. 3089 July Term, 1955, against the defendants in the penal sum of $90,000, conditioned upon the payment of $43,134.00.

4. On June 7, 1955, Martha M. Berg, Plaintiff, by *praecipe*, caused the Prothonotary of the Court of Common Pleas of Allegheny County, Pennsylvania, to issue a writ of fi. fa. authorizing and directing the sale of the real estate described in Exhibit "A" attached hereto, by the Sheriff of Allegheny County.

5. The proposed sale by the Sheriff of Allegheny County, Pennsylvania, on July 5, 1955, was duly advertised in the Pittsburgh Post-Gazette on June 11, 1955, June 18, 1955, and June 25, 1955, and in Pittsburgh Legal Journal on June 10, 1955, June 17, 1955 and June 24, 1955.

6. On motion of Plaintiff your Honorable Court entered an order postponing said Sheriff's Sale from July
106 5, 1955, to September 12, 1955, without necessity for issuance of an alias writ of fi. fa. and without further advertising, and subsequently, on motion of Plaintiff, your Honorable Court entered an order postponing said Sheriff's Sale from September 12, 1955, to December 5, 1955, without necessity for issuance of an alias writ of fi. fa. and without further advertising.

7. Since January 28, 1948, the date when the mortgage of Plaintiff became effective, Defendants have caused the real estate herein described to be conveyed to Mountaineer Engineering Company, a corporation, and re-conveyed to Defendants on at least two occasions.

8. The United States of America has entered tax liens of record against Mountaineer Engineering Company and against George H. A. Parkman, Jr., and Gladys Marie Short Parkman, which tax liens are junior to Plaintiff's mortgage and judgment entered thereon but which liens would not be divested by a Sheriff Sale of the real estate by reason of the provisions of the Act of Congress so providing and described in the next succeeding paragraph.

9. The Act of June 25, 1948, c. 646, § 1, 62 Stat. 972, as amended May 24, 1949, c. 139, § 119, 63 Stat. 105; 28 USCA § 2410, provides, *inter alia*, that the United States of America may be named a party to the sale of real estate by a state court in order to divest the tax liens of United States of America.

10. The tax liens of the United States of America against Mountaineer Engineering Company which may be liens on the subject property, are as follows:

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Number:	*Date filed:*	*Nature of Lien:*	*Amount:*
7333	April 11, 1949	Emp. Tax and F.I.C.	$ 2,395.24
7337	April 14, 1949	Emp. Tax	1,402.29
7371	April 25, 1949	Withholding Tax	13,508.95
7908	Aug. 29, 1949	Withholding Tax and Emp. Tax F.I.C.	6,806.63
8056	Sept. 26, 1949	Withholding Tax	8,745.89
8075	Oct. 4, 1949	Emp. Tax	3,230.63
10311	Oct. 4, 1951	Withholding Tax and F.I.C.	4,540.53
10441	Nov. 28, 1951	Emp. Tax-F.U.T.	6,125.42
20019 (12012)	Oct. 16, 1953	Emp. Tax	1,197.98
22069 (13171)	Apr. 23, 1955	Emp. Tax-F.U.T.	1,336.70

11. The tax lien of the United States of America against George H. A. Parkman, Jr., and Gladys Marie Short Parkman, identified in said tax lien as George Parkman, Jr., and Marie Parkman, which may be a lien on the subject property is as follows:

Number:	*Date filed:*	*Nature of Lien:*	*Amount:*
22088 (13194)	May 3, 1955	Additional Income Tax	$ 471.39
Additional lien (13623)	Oct. 13, 1955	1948, 49.50 Addn. Inc. tax	$9,767.68

WHEREFORE, your Petitioner prays that an order be entered joining the United States of America as a party to the above entitled action so that the several tax liens of United States of America and any other liens of United States of America which may be liens against said
108 property and which are junior to Plaintiff's mortgage may be divested by the proposed Sheriff's Sale.

(s) J. WRAY CONNOLLY
(s) WILLIAM Q. SWANSON, JR.
(s) MOORHEAD & KNOX
Attorneys for Plaintiff

COMMONWEALTH OF PENNSYLVANIA
COUNTY OF ALLEGHENY, SS:

Before me, a Notary Public in and for the Commonwealth and County aforesaid, personally appeared J. WRAY CONNOLLY, Esquire, of Moorhead & Knox, Attorneys for Petitioner, who, being duly sworn according to law, deposes and says that the facts set forth in the foregoing Petition are true and correct, to the best of his knowledge, information and belief.

(s) J. WRAY CONNOLLY

Subscribed and sworn to before me this 21st day of September, 1955.

(s) J. M. McLEAN
Notary Public

ORDER OF COURT

And now, to-wit, this 22nd day of September, 1955, upon consideration of the attached Petition and on motion of J. Wray Connolly and Moorhead & Knox, Attorneys for Martha M. Berg, Plaintiff, a rule is granted on the United States of America, George H. A. Parkman, Jr., and Gladys Marie Short Parkman to show cause why the United States of America should not be made a party to this pro-
109 ceeding, pursuant to the provisions of the Act of Congress, 68 Stat. 105, 28 USCA § 2410, said rule returnable 60 days after service on United States of America, said service to be had by serving the United States Attorney for the Western District of Pennsylvania, or his authorized assistant, personally, the Attorney General of the United States, at Washington, District of Columbia, by registered mail as provided by the above Act of Congress, and George H. A. Parkman and Gladys Marie Short Parkman.

(s) BY THE COURT
AXA

[Exhibit "A" Omitted]

110 III.

IN THE COURT OF COMMON PLEAS OF ALLEGHENY COUNTY, PENNSYLVANIA

Fi. Fa. No. 521 July Term, 1955
Sur D. S. B. No. 3089 July Term, 1955

Martha M. Berg

v.

George H. A. Parkman and Gladys Marie Short Parkman, his wife

ORDER OF COURT

Now, to-wit, December 20, 1955, it appearing to the Court that service of Petition and Rule to join the United States of America as an additional party defendant in the above case was made on the United States of America by personal service on the Assistant to the United States Attorney for the Western District of Pennsylvania, and by registered mail upon the Attorney General of the United States at Washington, D. C., and by registered mail upon George H. A. Parkman and Gladys Marie Short Parkman, and, it further appearing that more than sixty days have elapsed from the date of the last of such services and that no answer has been filed by any of said parties—on
111 motion of Moorhead & Knox, Attorneys for Plaintiff, said rule is hereby made absolute and the United States of America is hereby joined as a party defendant in the above entitled case in accordance with and pursuant to the Act of Congress, 68 Stat. 105, 28 United States Code Annotated, Section 2410 *et seq.*, to the end that taxes due the United States of America enumerated in said Petition and the tax lien in favor of the United States of America subsequently filed on October 13, 1955, in the Prothonotary's Office of Allegheny County, Pa., at No. 13623, being additional income tax for the years 1948, 1949 and 1950

in the amount of $9767.68 against the said George Parkman, Jr., and Marie Parkman shall be divested by the sale of the real estate described in said petition being made by the Sheriff of Allegheny County, Pennsylvania, on January 3, 1956, after which sale the said real estate so sold shall be free and clear of all liens.

[JUDGE WEISS]

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113 IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12,711

UNITED STATES OF AMERICA, APPELLANT

v.

WILLIAM J. BROSNAN, FRANCIS H. JACOB, MARTHA M. BERG, GEORGE H. A. PARKMAN, GLADYS MARIE SHORT PARKMAN AND MOUNTAIN ENGINEERING COMPANY, APPELLEES.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Argued December 19, 1958

Before BIGGS, *Chief Judge*, and MCLAUGHLIN and HASTIE, *Circuit Judges*.

Opinion of the Court

Filed March 26, 1959

By MCLAUGHLIN, *Circuit Judge*.

On January 28, 1948, Martha M. Berg and her husband, J. D. Berg, conveyed to George H. and Gladys M. Parkman 175 acres in Moon Township, Pennsylvania. The Parkmans gave back a purchase money mortgage in the sum of $45,000 which was duly recorded and a mortgage bond in

the sum of $90,000. Thereafter the property was
114 conveyed a number of times back and forth between the Parkmans and Mountain Engineering Company, a corporation controlled by the Parkmans; these conveyances were all subject to the purchase money mortgage.

During a period when the corporation owned the property certain federal tax liens attached to it and were recorded. Thereafter an additional federal tax lien arising from a tax liability of the Parkmans attached to the property and was recorded at a time when the Parkmans held the property. The tax liens were all junior to the mortgage.

Payment of the mortgage was defaulted and the surviving mortgagee on June 7, 1955 caused a confession of judgment to be entered on the bond. The judgment was for $43,135 plus interest from June 1, 1955. Subsequently a writ of *fieri facias* for the sale of the property issued to the sheriff; upon application, however, the sale was postponed and the surviving mortgagee petitioned the Pennsylvania Court of Common Pleas for a rule upon the United States to show cause why it should not be made a party to the foreclosure proceedings. The rule was granted and served upon the United States. No answer was filed, so eighty-nine days after service the United States was made a party to the proceedings. During the intervening time Wililam J. Brosnan and Francis H. Jacob had acquired the surviving mortgagee's interest.

The sheriff held the sale of the property on January 3, 1956; it was bid in by Brosnan and Jacob for $6,203 and, it is presumed, the discharge of the mortgage indebtedness. The amount of the bid went to satisfy costs of the sale, and for various outstanding local taxes.

On January 3, 1957, one year after the sale the government attempted to redeem the property [1] through the tender by an agent to Brosnan of a check for $6,575.42, which represented the amount bid at the sheriff's sale, plus interest. Brosnan refused it as totally inadequate to effect
a redemption. Brosnan and Jacob have since claimed
115 that an effective redemption would have required a tender of $55,591.28, the amount of their asserted interest in the property.

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[1] 28 U.S.C. 2410(c) (1952).

The United States subsequently brought this action under § 7403, Internal Revenue Code of 1954,[2] to enforce its lien. The district court thus was presented with the question of whether the government lien was still enforcible.

The court held, 164 F.Supp. 357 (W.D.Pa. 1958), that the United States had not been made a party to the foreclosure proceedings in the state court by the attempted invocation in that proceeding of 28 U.S.C. § 2410 (1952) because no attempt was made to bring in the United States until after judgment had been entered on the confession of judgment. But the court went on to hold that the lien had nonetheless been divested simply by reason of its being a junior lien.

The government argues that § 7403, Internal Revenue Code 1954, footnote 2 supra, directs and requires that a decree for sale of the property in question be entered here. It is plain, however, that a sale may be decreed only "* * * where a claim or interest of the United States * * * is established." Thus the issue presented is whether after the sale on execution following the confession of judgment the United States still held any interest in the property.

For its claim that it continued to hold an interest in the property, the government's basic premise is that once a lien has been established by federal law it remains
116 until it is satisfied or becomes unenforcible by lapse of time.[3] The government asserts that the lien can be satisfied other than by payment only by compliance with

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[2] That section reads in pertinent part:

"(a) *Filing.*—In any case where there has been a refusal or neglect to pay any tax, or to discharge any liability in respect thereof * * * the Attorney General * * * may direct a civil action to be filed in a district court of the United States to enforce the lien of the United States * * *."

"(c) *Adjudication and decree.*—The court shall * * * proceed to adjudicate all matters involved therein and finally determine the merits of all claims to and liens upon the property, and, in all cases where a claim or interest of the United States therein is established, may decree a sale of such property, by the proper officer of the court, and a distribution of the proceeds of such sale according to the findings of the court in respect to the interests of the parties and of the United States."

[3] § 6322, Internal Revenue Code, 1954; § 3671, Internal Revnue Code, 1939.

one of a number of other federal statutes.[4] It is urged that when these statutes are taken together a plain intent on the part of the Congress to furnish exclusive means for removal of federal liens is made out. Since assertedly none of these provisions has previously been complied with, the government concludes that the lien remains for enforcement in this proceeding.

The claim advanced by the government that state law in no way controls federal tax liens which have attached to property is too broad;[5] the cases cited for this proposition stand more narrowly for the tenet that the priority of a lien of the United States for unpaid taxes relative to other liens always involves a federal question.[6] In this case there is no question of priority, it being conceded that the liens of the United States were junior.

For its conclusion that the federal statutes make out a scheme by which Congress intended to furnish the only means for extinguishing even junior liens held by the United States, the government has relied heavily on the legislative history of what is now 28 U.S.C. § 2410 (1952).[7] The House Report[8] states that without the legislation involved there is no way in which a cloud upon title caused by a junior lien held by the United States can be removed when a prior mortgage is being foreclosed, since there is no statute to authorize making the United States a party to such a proceeding. The government would conclude
117 from this that a junior lien in favor of the United States remains unaffected when foreclosure of the senior lien is had without making the United States party thereto.

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[4] §§ 6325, 7403, 7424, Internal Revenue Code, 1954; 28 U.S.C. § 2410 (1952).

[5] Reliance in this case on United States v. Kensington Shipyard & Drydock Corp., 169 F.2d 9 (3 Cir. 1948) is misplaced, since the lien held by the United States there was superior to all others.

[6] E.g., United States v. New Britain, 347 U.S. 81 (1954); United States v. Texas, 314 U.S. 480 (1941); Ersa, Inc. v. Dudley, 234 F.2d 178 (3 Cir. 1956).

[7] 46 Stat. 1528 (1931).

[8] H.Rep. , 71st Cong. 2d Sess.

But this court has already held that the purpose of § 2410 was to permit the joining of the United States in foreclosure proceedings on a more senior lien in jurisdictions where joinder would be necessary for estopping the junior lienor from thereafter asserting his claim. United States v. Cless, 254 F.2d 590 (3 Cir. 1958). The Cless case decided that where, as in Pennsylvania, such joinder was not necessary to divest a junior lien, the United States did not have to be joined in order to divest its junior lien. We conclude that the government's position is not convincing and that Congress never intended government-held junior liens not to be subject to divestment by foreclosure proceedings carried out in the state courts without joinder of the United States.[9] Thus state law must be looked to in order to determine those rights and incidents arising from the federally created lien which are not prescribed by federal law. See United States v. Bess, 357 U.S. 51, 55 (1958).

In United States v. Boyd, 246 F.2d 477, 483 (5 Cir. 1957), cert. den. 355 U.S. 899, a case closely similar to this one, the court perceptively pointed out that it is the consequence of the "* * * prior lien and the right of enforcement under it which destroys the junior encumbrance whether it be a private or Federal tax lien. The extinguishment or destruction of the junior lien comes from the nature of the superior lien and not from a later subsequent equity determination * * * that this has been the effect of enforcement of the senior lien."

Pennsylvania law requires no more notice to junior lienors than is afforded by publication before subjecting their liens to extinguishment by sale of the property
118 under the writ of *fieri facias* which was issued in this matter. Pa. Stat. Ann. tit. 21, § 804; tit. 12, §§ 2441-2444. Whether this form of notice might raise constitutional questions of due process under Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1950), when the identity of persons holding a junior interest in the property is or should be known to the senior mortgagee is of no concern in the present situation; it is clear that notice of this foreclosure was given to the United States.

[9] We cannot agree with the decision of the Ninth Circuit (which is based on an assumption to the contrary) in United States v. Bank of America National Trust & Savings Association, — F.2d —, opinion filed February 2, 1959.

The buyer at the Pennsylvania sheriff's sale takes the same estate as was held prior to execution by the one for whose debt the property is sold. Pa. Stat. Ann. tit. 12, § 2447. When the execution is on a judgment for a mortgage debt, the execution relates back to the time of giving the mortgage. West Arch Building & Loan Assn. v. Nichols, 303 Pa. 434 (1931); Moore v. Schell, 99 Pa. Super. 81 (1930). The United States consequently retains no interest in the property.

The government suggests that Metropolitan Life Insurance Co. v. United States, 107 F.2d 311 (6 Cir. 1939), rather than the Boyd opinion, expresses the law for this case. But in that decision the court conceived of the proceeding as one for the divestiture of an existing lien, rather than as one to determine the more basic question of the very existence of the lien.[10]

A question remains as to whether the United States had any right to redeem the property under 28 U.S.C. § 2410(c) (1952), and if it did, whether the right was effectively exercised by the tender of only $6,575.42. Without dealing with the effect of the government's present argument regarding inapplicability of the section to this
119 case and so passing the question of whether a right of redemption is conferred only when foreclosure occurs under § 2410, it is plain in any event that the tender was insufficient in amount. One who seeks to redeem is proceeding on the hypothesis that the mortgage has never been foreclosed as to him. He can lift the mortgage only by paying it in full. Collins v. Riggs, 81 U.S. (14 Wall.) 491 (1872). It is undisputed that the unsatisfied mortgage debt for which the property was sold amounted to $43,135 plus interest.

Since the United States has demonstrated no right to the property, the judgment will be affirmed.

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[10] For adverse comment on Metropolitan Life Insurance Co. v. United States, supra, see Notes, 53 Harv. L.R. 894 and 49 Yale L.J. 1106. At pp. 1108 and 1109 of the latter it is said: "In arriving at its result, the majority failed to distinguish between releasing a specific lien and adjudicating a specific lien to be non-existent. Under this view, an income tax lien once it has properly attached, assumes some absolute status, destructible only upon submission of the premises to resale, in accordance with the provisions of the statute. Destructibility of the tax debtor's interest, by reason of limitation on its extent, and consequent failure of the lien for want of a res are ignored as possibilities."

121 IN UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 12711

UNITED STATES OF AMERICA, APPELLANT

vs.

WILLIAM J. BROSNAN, FRANCIS H. JACOB, GEORGE H. A. PARKMAN, GLADYS MARIE SHORT PARKMAN AND MOUNTAIN ENGINEERING COMPANY

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF PENNSYLVANIA

Present: BIGGS, *Chief Judge*, and MCLAUGHLIN and HASTIE, *Circuit Judges*

Judgment—March 26, 1959

This cause came on to be heard on the record from the United States District Court for the Western District of Pennsylvania and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed.

• • • • • • • • • •

March 26, 1959

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(File endorsement omitted)

123 UNITED STATES OF AMERICA, SS:

THE PRESIDENT OF THE UNITED STATES OF AMERICA

To the Honorable, the Judges of the United States District Court for the Western District of Pennsylvania—Greeting:

Mandate

WHEREAS, lately in the United States District Court for the Western District of Pennsylvania, before you or some of you, in a cause between United States of America, Plaintiff and William J. Brosnan, Francis H. Jacob, George H. A. Parkman, Gladys Marie Short Parkman and Mountain Engineering Company, Defendants (District Court No. 15973 Civil Action) a judgment was entered on April 29, 1958 and entered on the judgment docket May 1, 1958 in favor of Defendants and against Plaintiff, as by the inspection of the record of the said District Court, which was brought into the United States Court of Appeals for the Third Circuit by virtue of an appeal by United States of America agreeably to the Act of Congress, in such case made and provided, more fully and at large appears.

AND WHEREAS, the said cause came on to be heard before the said United States Court of Appeals for the Third Circuit, on the said record, and was argued by counsel;

ON CONSIDERATION WHEREOF, it is now here ordered and adjudged by this Court that the judgment of the said District Court in this case be, and the same is hereby affirmed. March 26, 1959

* * * * * * * * * * *

(File endorsement omitted)

124 YOU, THEREFORE, ARE HEREBY COMMANDED that such proceedings be had in said cause, in conformity with the opinion and judgment of this court, as according

to right and justice, and the laws of the United States, ought to be had, the said appeal notwithstanding.

Signed and sealed this 14th day of April in the year of our Lord one thousand nine hundred and fifty-nine.

IDA O. CRESKOFF
Clerk, United States Court of Appeals for the Third Circuit

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125 Clerk's Certificate to foregoing transcript omitted in printing.

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127 SUPREME COURT OF THE UNITED STATES

No. 137, October Term, 1959

UNITED STATES OF AMERICA, PETITIONER,

vs.

WILLIAM J. BROSNAN ET AL.

Order Allowing Certiorari. October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Third Circuit is granted, and one and one half hours are allowed for oral argument.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

LIBRARY
SUPREME COURT, U. S.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1959

No. 183

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,
PETITIONER,

vs.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

PETITION FOR CERTIORARI FILED JULY 6, 1959
CERTIORARI GRANTED OCTOBER 12, 1959

No. 16034

United States
Court of Appeals
for the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association,

Appellee.

Transcript of Record

Appeal from the United States District Court for the Northern District of California, Southern Division

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[Clerk's Note: When deemed likely to be of an important nature, errors or doubtful matters appearing in the original certified record are printed literally in italic; and, likewise, cancelled matter appearing in the original certified record is printed and cancelled herein accordingly. When possible, an omission from the text is indicated by printing in italic the two words between which the omission seems to occur.]

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Exhibit "B"—(Continued)

Beginning at the most northerly corner of the within described parcel whence the ¼ Section corner between Sections 9 and 10, T. 4 N., R. 11 E., M.D.B. & M., bears N. 16° 35′ E. 206.25 feet and N. 25° 32′ W. 358.80 feet distant, and running thence 1st. S. 16° 35′ W. 86.57 feet; thence 2nd. S. 82° 00′ E. 158.55 feet; thence 3rd N. 5° 39′ E. 85.60 feet and thence 4th. N. 82° 00′ W. 142.11 feet to the place of beginning.

Together With an easement 20 feet in width for roadway purposes, described as follows:

Beginning At the most southerly corner of that certain parcel of land situate in the County of Calaveras, State of California, and described in the Deed dated January 6th, 1950 by Richard G. Churchill et al. to Guerdon L. Churchill et ux. and recorded January 11th, 1950 in Book 59 of Official Records at page 59, Calaveras County Records, and running thence 1st. South 82° 00′ East a distance of 20.02 feet; 2nd. North 5° 39′ East a distance of 201.99 feet to the County Road known as the Old State Highway; 3rd. North 61° 05′ West a distance of 21.77 feet along said road; and 4th. South 5° 39′ West a distance of 209.77 feet to the point of beginning.

EXHIBIT "C"

Located in File Building

1 Stanley Bench Grinder with ½ HP Stanley Motor #G67414A

1 Acme Saw Gummer with ¾ HP Westinghouse Motor #1180279ALO

NAMES AND ADDRESSES OF ATTORNEYS

CHARLES K. RICE,
Assistant United States Attorney General,

LEE A. JACKSON,
Attorney,
Dept. of Justice,
Washington 25, D. C.,

LLOYD H. BURKE,
United States Attorney,

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Assistants United States Attorney,
Post Office Building,
San Francisco, Calif.,

For Appellant.

SAMUEL B. STEWART,
GEORGE CHADWICK, JR.,
ELDON C. PARR,

300 Montgomery Street,
San Francisco 4, Calif.,

For Appellee.

Exhibit "C"—(Continued)

1 Oxygen Acetylene Presto Weld Welding Outfit with gauges, hose, torch tips & cart

1 Shober Dial Amp Electric Welder Model K-200

Extra Motors

1 ½ HP U.S. Motor, Serial #654011, 1—1 HP U.S. Motor, Serial #652807

1 5 HP U.S. Motor, Serial #745374

1 3 HP Crocker Wheeler Motor, Serial #116931

1 1 HP B-Line Motor, Serial #2216380

1 2 HP G.E. Motor on Falk Motor Reducer #LJ6327, 1—10 H.P. U.S. Motor, Serial #491982

Located in Mill Building

Main Control Electrical Panel:

Disconnect Switches	100A	60A	30A	Misc.
Main				600A
Blower	1			
14			14	
9		9		
1				200V
1 Multi-Breaker				110-220V
Line Starters Magnetic				
Blower	1			
9			9	
7		7		

1—15 KVA Transformer

Value (Main Control Electrical Panel)

1 Goff Moulder 2x4 with following motors & Switches:

1 1 HP U.S. Motor, Serial #73986

1 7½ HP U.S. Motor, Serial #602001

In the United States District Court, Northern District of California, Southern Division

No. 36485

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

PETITION FOR REMOVAL

The defendant, United States of America, by the undersigned, its attorneys, states that:

1. This petition is brought pursuant to Section 1444 of Title 28, U. S. C., which provides:

Any action brought under Section 2410 of this title against the United States in any State court may be removed by the United States to the District Court of the United States for the district and division in which the action is pending.

2. An action to quiet title to real property was filed in the Superior Court of the State of California, in and for the County of Calaveras bearing the above caption.

3. The United States of America has been named a party defendant pursuant to the provisions of Section 2410 of Title 28 U.S.C., on the ground that it claims a lien upon the real property.

4. A copy of the Summons and Complaint was received by the United States Attorney on May 16, 1957, and copies thereof are attached hereto.

Wherefore, the defendant, United States of America, prays that this action be removed to this court.

LLOYD H. BURKE,
United States Attorney,
/s/ By LYNN J. GILLARD,
Assistant U. S. Attorney,
/s/ JOSEPH O. GREAVES,
Attorney, Office of Regional Counsel, Internal Revenue Service.

Duly Verified.

Affidavit of Mailing Attached.

In the Superior Court of the State of California
in and for the County of Calaveras

No. 4775

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, Plaintiff,

vs.

UNITED STATES OF AMERICA,
Defendant.

COMPLAINT TO QUIET TITLE

Plaintiff Complains of Defendant and For a First Cause of Action Alleges:

I.

Bank of America National Trust and Savings Association, Plaintiff herein, is a national banking association, organized and existing under and by virtue of the laws of the United States of America, having its principal place of business at 300 Montgomery Street, in the City and County of San Francisco, State of California.

II.

Plaintiff is the owner in fee simple of that certain piece or parcel of land situate, lying and being in the County of Calaveras, State of California, bounded and particularly described in Exhibit A.

III.

Plaintiff is the owner in fee simple of that certain piece or parcel of land situate, lying and being in the County of Calaveras, State of California, bounded and particularly described in Exhibit B.

IV.

The Defendant above named claims and asserts an interest in and to said parcels of land adverse to Plaintiff, to wit:

"13th. Notice of Federal Tax Lien, dated February 10th, 1954, and filed February 19th, 1954, in Calaveras County, California, by U. S. Internal Revenue, San Francisco District, against Sierra Wood Products Corporation, for $5,309.77, plus statutory interest from date of notice of demand to date of payment, Serial No. 846-1954.

14th. Notice of Federal Tax Lien, dated March 25th, 1954, and filed April 5th, 1954, in Calaveras County, California, by U. S. Internal Revenue, San Francisco District, against Sierra Wood Products Corp., for $6,207.58, plus statutory interest from date of notice and demand to date of payment, Serial No. 1971-1954."

Said claims of Defendant are without any right whatever and Defendant has no estate, lien, right, title or interest whatever in said land or premises or any part thereof.

Plaintiff Complains of Defendant and For a Second Cause of Action Alleges:

I.

Plaintiff refers to Paragraph I of its first cause of action and incorporates the same herein as if set forth in full. Plaintiff is now and for some time hitherto has been the owner of the personal property particularly described in Exhibit C.

II.

The Defendant above named claims and asserts an interest in and to the above described personal property adverse to Plaintiff, to wit:

"13th. Notice of Federal Tax Lien, dated February 10th, 1954, and filed February 19th, 1954, in Calaveras County, California, by U. S. Internal Revenue, San Francisco District, against Sierra Wood Products Corporation, for

$5,309.77, plus statutory interest from date of notice of demand to date of payment, Serial No. 846-1954.

14th. Notice of Federal Tax Lien, dated March 25th, 1954, and filed April 5th, 1954, in Calaveras County, California, by U. S. Internal Revenue, San Francisco District, against Sierra Wood Products Corp., for $6,207.58, plus statutory interest from date of notice and demand to date of payment, Serial No. 1971-1954."

Plaintiff alleges that said claim and each of them are without any right whatever. Defendant has no estate, lien, right, title or interest in said personal property or in any part thereof.

Wherefore, Plaintiff prays: (1) That Defendant be required to set forth the nature of its several claims and that all adverse claims of Defendant, and each of them be determined by a decree of this court; (2) That by said decree it be declared and adjudged:

(a) That Plaintiff is the owner of the parcels of land described in Exhibit A and B, and that Defendant has no estate, lien, right, title or interest whatever in or to said land, and also that Defendant be forever barred and enjoined from asserting any claim whatever in or to said land or premises adverse to Plaintiff;

(b) That Plaintiff is the owner of the personal property described in Exhibit C, and that Defend-

ant has no estate, lien, right, title or interest whatever in said personal property, and also that Defendant be forever barred from asserting any claim whatever in or to said personal property adverse to Plaintiff;

(3) For costs of suit incurred herein and for such other and further relief as to the Court may seem meet and proper.

SAMUEL B. STEWART,
GEORGE CHADWICK, JR.,
ELDON C. PARR,
/s/ By ELDON C. PARR,
Attorneys for Plaintiff.

Duly Verified

[Endorsed]: Filed May 3, 1957.

[Title of Superior Court and Cause.]

SUMMONS

The People of the State of California Send Greeting to: United States of America, Defendants.

You Are Hereby Directed to appear and answer the complaint in an action entitled as above brought against you in the Superior Court of the State of California, in and for the County of Calaveras, within ten days after the service on you of this summons—if served within this County; or within thirty days if served elsewhere.

And you are hereby notified that unless you appear and answer as above required, the said

Plaintiff will take judgment for any money or damages demanded in the complaint as arising upon contract or will apply to the Court for any other relief demanded in the complaint.

Given under my hand and seal of the Superior Court at the County of Calaveras, State of California.

Dated: May 3, 1957.

[Seal] JOHN SQUELLATI,
Clerk,
By EMMA THOMPSON,
Deputy Clerk.

EXHIBIT "A"

Parcel One:

A fractional portion of the NW1/4 of SW1/4 of Section 10, T. 4 N., R. 11 E., M.D.B. & M., described as follows:

Beginning at the most northerly corner of the within described parcel and on the fence line as it existed September, 1947 on the Southerly side of the County Highway, whence the 1/4 Sec. corner between Secs. 9 and 10, T. 4 N., R. 11 E., M.D.B. & M., bears N. 25° 32' W., 358.8 feet distant, and running thence 1st. S. 16° 35' W., 358.5 feet along a fence; thence 2nd. S. 14° 39' W. 156.8 feet to a concrete marker on the northerly right of way boundary of the State Highway between Valley Springs and San Andreas, which marker is opposite and 40 feet from Engineers' center line Station 232 plus 00

Exhibit "A"—(Continued)

of plans adopted by The California Highway Commission on July 9, 1937; thence 3rd. N. 87° 40' E., 1191.4 feet along said State right of way boundary; thence 4th. N. 11° 21' W., 12.5 feet to the southerly side of said County Highway; thence, and following along the fence on the southerly side of said County Highway for the following seven courses, 5th. N. 75° 35' W. 39.9 feet, thence 6th. N. 77° 54' W. 318 feet; thence 7th. N. 75° 44' W. 30.9 feet; thence 8th. N. 67° 27' W. 60.5 feet; thence 9th. N. 67° 03' W. 59.8 feet; thence 10th. N. 63° 38' W., 50.4 feet; thence 11th. N. 61° 05' W. 581.0 feet to the place of beginning, and containing 5.854 acres, more or less.

EXHIBIT "B"

Parcel Two:

A fractional portion of NE¼ of SE¼ of Sec. 9, and a fractional portion of NW¼ of SW¼ of Sec. 10, T. 4 N., R. 11 E., M.D.B. & M., described as follows:

Beginning at the NE corner of the within described parcel, whence the ¼ sec. corner between Secs. 9 and 10, T. 4 N., R. 11 E., M. D. B. & M., bears N. 4° 20' W. 668.7 feet distant, and running thence 1st. S. 87° 40' W. 795.8 feet, parallel to the State Highway between Valley Springs and San Andreas and 150 feet northerly from the northerly right of way boundary thereof; thence 2nd. S. 2° 20' E. 150 feet to a point on the said northerly right of way boundary of the State Highway;

Exhibit "B"—(Continued)

thence 3rd. N. 87° 40′ E. 750 feet along said last mentioned highway boundary to a concrete marker thereon, which marker is opposite and 40 feet from Engineers' center line station 232 plus 00 of plans adopted by the California Highway Commission on July 9, 1937; thence 4th. N. 14° 39′ E., 156.8 feet to the place of beginning, and containing 2.662 acres, more or less.

Saving, Excepting and Reserving, however, all of the minerals and mineral rights below 50 feet from the surface of the above described Parcels One and Two of said real property above described together with the right to enter therein and extract and remove the same from and through the adjoining premises of said grantors and not from or through the surface of the above described two parcels of real property and also reserving the further right to obtain water from any water well constructed in and upon the above described two parcels of real property by said grantees in the event that said grantees construct or develop any water well upon the above described two parcels of real property that shall materially affect the flow of water in any of the existing wells had and maintained by grantors upon their adjoining premises, it being expressly understood and agreed that the grantees herein are herein and hereby expressly given the right to sink or construct a well in and upon said two parcels of real property hereby conveyed and into the real property below 50 feet from the surface thereof to any depth that may be neces-

Exhibit "B"—(Continued)

sary for said grantees to go in order to obtain a supply of water for use upon said two parcels of real property hereby conveyed, as said minerals and mineral rights and right to water were excepted and reserved in the Deed dated March 25th, 1949 by Mary Alma Gann et al., as Grantors, to R. G. Churchill and G. L. Churchill, as Grantees, and recorded May 26th, 1949 in Book 56 of Official Records at page 63 et seq., Calaveras County Records, and in the Deed dated April 20th, 1949 by Emily N. Swinborne, as Guardian of the Persons and Estates of Marilyn Ann Haupt et al., minors, as Grantor, to R. G. Churchill and G. L. Churchill, as Grantees, and recorded May 26th, 1949 in Book 56 of Official Records, at page 65 et seq., Calaveras County Records.

And Further Excepting from the lands and premises hereinabove described the parcel hereinafter described, and subject to the Easement 20 feet in width for roadway purposes hereinafter described, viz:

All that real property situated in the County of Calaveras, State of California, and particularly bounded and described as follows:

Being a fractional portion of NW¼ of SW¼ of Section 10, T. 4 N., R. 11 E., M.D.B. & M., described as follows:

Beginning at the most northerly corner of the within described parcel whence the ¼ Section corner between Sections 9 and 10, T. 4 N., R. 11 E., M.D.B. & M., bears N. 16° 35' E. 292.82 feet and

Exhibit "B"—(Continued)

N. 25° 32′ W. 358.8 feet distant, and running thence 1st, S. 16° 35′ W. 65.68 feet; thence 2nd. S. 82° 00′ E. 171.0 feet; thence 3rd. N. 5° 39′ E. 65.0 feet; and thence 4th. N. 82° 00′ W. 158.55 feet to the place of beginning.

Together With an easement 20 feet in width for Roadway purposes described as follows:

Beginning at the most easterly corner of that certain parcel of land situate in the County of Calaveras, State of California, and described in the Deed dated January 6th, 1950 by Richard G. Churchill, et al., to Richard G. Churchill et ux., and recorded January 11th, 1950 in Book 59 of Official Records, at page 58, Calaveras County Records, and running thence 1st. South 5° 39′ West a distance of 20 feet; 2nd. South 82° 00′ East a distance of 20.02 feet; 3rd. North 5° 39′ East a distance of 221.99 feet to the County Road known as the Old State Highway; 4th. North 61° 05′ West a distance of 21.77 feet; thence 5th. South 5° 39′ West a distance of 209.77 feet to the place of beginning.

And Further Excepting from the lands and premises hereinabove described the parcel hereinafter described and subject to the easement 20 feet in width for roadway purposes hereinafter described, viz:

All that real property situated in the County of Calaveras, State of California, and particularly described as follows:

Being a fractional portion of NW¼ of SW¼ of Section 10, T. 4 N., R. 11 E., M.D.B. & M., described as follows:

Exhibit "C"—(Continued)

1 3 HP U. S. Motor, Serial #716205, 3—30 Amp Magnetic Switches

1 Atlas 10" Bench Saw #003982 with 1 HP Atlas Motor #6613KAP6783

1 Goff Moulder 2x4 with following motors and switches:

1 1½ HP U.S. Motor, Serial #712060, 1—5 HP U.S. Motor, Serial #571971

1 5 HP U.S. Motor, Serial #745372, 3—30 Amp Magnetic Switches

1 Heston-Anderson Swing Cut Off Saw #55 with 1—3 HP B-Line Motor #2114177

1 Eby Swing Cutoff Saw with 1—3 HP G.E. Motor, #XC29399

1 Irvington Swing Cut Off Saw with 1—1 HP G.E. Motor #RX18771

1 Shop Built Gang Rip Saw with 1—5 HP U.S. Motor, #434680 and 1—2 HP A.C. Motor on Falk Speed Reducer #2251 DUC

1 Hayward-Hallett Air Compressor #1693 NB with 1—7½ HP Westinghouse Motor #881-EM4522

Located in Storage Shed

1 XL Moulder 2x4, no motors, not in use

1 Crescent Pony Planer, Ser. #79900 with 1—1 HP Westinghouse Motor #7408 and 1—7½ HP Woods Motor #59591—Direct Drive

1 Shop built equalizer with 1—10 HP Westinghouse Motor #9EM2228 and 1—¾ HP Master Gear Motor #ZH4436, 1 Magnetic Switch

Exhibit "C"—(Continued)

1 Irvington Swing Cut Off with 1—1 HP Westinghouse Motor #7410

1 California Saw Works Cleat Machine #F-10547 with 1—¾ HP Sterling Vertical Motor #B-4009-2

1 California Saw Works Cutoff Machine #F-10547 with 1—7½ HP Westinghouse Motor #6406 and 1—30 Amp Magnetic Switch

Miscellaneous

1 California Blower #1512, Blowpipe Type, with 1—30 HP Westinghouse Motor #7404

1 240′ Rex Transfer chain on 60′ wooden frame with 1—3 HP G.E. Gear Reducer Motor

1 500′ Rex Transfer Chain on wood frame with 1—3 HP G.E. Motor #J6327 with Falk Gear Reducer #180-833

1 300′ Chain on 150′ Sawdust Conveyor with 1—5 HP Westinghouse Motor with Speed Reducer #1EM-3509

1 Sears Cement Mixer ¼ sack capacity, ⅓ HP Motor

1 Sawdust Burner, sheet steel over steel frame bolted to concrete pier foundation

Turner 42″ Tandem Twin Band Resaw with Bevelling and Rounding Attachments. Machine Serial #29561, 2 HP Sterling Speed Trol; Allis-Chalmers 5 HP Bevelling Motor, Serial #225; Two Allis-Chalmers 30 HP Main Drive Motors, Serial #588-587 & #588594

#663, with Turrer Ripping Attachment, Serial

Exhibit "C"—(Continued)

Turner 42" Tandem Twin Band Resaw, Serial #A47 2 HP Sterling Speed Trol; Two Westinghouse 30 HP Main Drive Motors, Serial #4807, Style 1441939; General Electric 15 HP Profile Motor #PE2390.

[Endorsed]: Filed May 27, 1957.

[Title of District Court and Cause.]

ANSWER OF THE UNITED STATES OF AMERICA

The United States of America for its answer to the Complaint, as to the First Cause of Action,

I.

Admits the allegations contained in paragraph I.

II.

Denies any information or belief as to the allegations contained in paragraph II and III.

III.

Admits the allegations contained in paragraph IV that the defendant, United States of America, claims an interest in said parcels of land adverse to the plaintiff, and alleges that with respect to the notice of Federal tax lien dated February 10, 1954, in the original amount of $5,309.77, for employment withholding taxes for the 3d quarter of 1953, which taxes were assessed on November 18, 1953, there remains due and owing $4,957.58, plus accrued interest as provided by law; that with respect to the notice of Federal tax lien dated March

25, 1954, in the amount of $6,207.58, for employment withholding taxes for the 4th quarter of 1953, which taxes were assessed on February 24, 1954, said amount remains due and owing; and the United States of America further alleges that there were assessed on March 4, 1954, Federal unemployment taxes for the 2d quarter 1954, in the amount of $328.40, against Sierra Wood Products Corporation; that said amount remains due and owing and is also a lien upon the property described in the complaint. The United States denies the allegations contained in the last three lines of paragraph IV.

The United States of America for its answer to the Second Cause of Action

I.

Admits that portion of paragraph I which incorporates paragraph I of the First Cause of Action but denies any information or belief as to whether plaintiff is, and has been, the owner of said personal property described in Exhibit C attached to the Complaint.

II.

Defendant, United States of America, in answer to paragraph II of plaintiff's Second Cause of Action, refers to paragraph III of its answer to the First Cause of Action and incorporates the same herein as if set forth in full.

Wherefore, the United States prays:

1. That this action be dismissed, or in the alternative

2. That the tax liens herein be foreclosed and the property sold and the proceeds be paid to the United States in accordance with its priority for application on the taxes as set forth herein, and

3. For such other and further relief as the Court deems just and proper.

LLOYD H. BURKE,
United States Attorney,
By CHARLES ELMER COLLETT,
Assistant U. S. Attorney,
JOSEPH O. GREAVES,
Attorney, Office of Regional Counsel, Internal Revenue Service.

Affidavit of Mailing Attached.

[Endorsed]: Filed July 10, 1957.

[Title of District Court and Cause.]

PRE-TRIAL ORDER

The above-entitled action having come on for pretrial conference on Friday, September 20, 1957, the following facts were agreed to by all respective parties and such facts are no longer in issue:

1. On February 13, 1953, Sierra Title Company, a California corporation, executed and delivered its deed of trust in favor of plaintiff. A true copy of said deed of trust is attached hereto marked Exhibit A and made a part hereof. At the time said deed of trust, Exhibit A hereof, was executed,

was the owner in fee simple of the real property described therein.

2. On February 13, 1953, Sierra Title Company, a California corporation, executed and delivered its chattel mortgage to plaintiff. A true copy of said chattel mortgage is attached hereto marked Exhibit B and made a part hereof. At the time of the execution of said chattel mortgage, Exhibit B hereof, Sierra Title Company, a California corporation, was the owner of each and all of the chattels described therein.

3. On April 9, 1953, Sierra Wood Products Corporation executed and delivered its chattel mortgage to plaintiff. A true copy of said chattel mortgage is attached hereto, marked Exhibit C, and made a part hereof. At the time of the execution of said chattel mortgage, Exhibit C hereof, Sierra Wood Products Corporation, a California corporation, was the owner of each and all of the chattels described therein.

4. Said deed of trust, Exhibit A hereof, and said chattel mortgages, Exhibits B and C hereof, were promptly and duly recorded upon execution and delivery.

5. On or about September 28, 1953, Sierra Title Company, a California corporation, transferred its right, title and interest in the real property described in said deed of trust, Exhibit A hereof, and in the chattels described in said chattel mortgage, Exhibit B hereof, to Sierra Wood Products

6. There was filed on February 19, 1954, with the Office of the County Recorder of Calaveras County, California, a notice of Federal tax lien against Sierra Wood Products Corporation in the original amount of $5,309.77 for employment withholding taxes for the 3rd quarter of 1953, which taxes were assessed on November 18, 1953, and although demanded, there remains due and owing $4,957.58, plus accrued interest as provided by law.

7. There was filed on April 5, 1954, with the Office of the County Recorder of Calaveras County, California, a notice of Federal tax lien against Sierra Wood Products Corporation in the original amount of $6,207.58 for employment withholding taxes for the 4th quarter of 1953, which taxes were assessed on February 24, 1954, and although demanded, the entire balance, plus accrued interest as provided by law, remains due and owing.

8. On March 4, 1954, Federal employment taxes for the 2nd quarter of 1954 in the amount of $328.40 were duly assessed against Sierra Wood Products Corporation and although demanded, said amount, plus accrued interest as provided by law, remains due and owing.

9. Default occurred in the performance of the obligations secured by said deed of trust, Exhibit A hereof, and said chattel mortgages, Exhibits B and C hereof. Following said default and prior to March 15, 1956, all necessary and proper procedures for the foreclosure of said deed of trust,

therein contained, were duly performed. After said default and prior to March 15, 1956, all necessary and proper procedures for the foreclosure of said chattel mortgages, Exhibits B and C hereof, by a pledgee sale were duly performed.

10. Said deed of trust, Exhibit A hereof, was duly foreclosed on March 15, 1956, by sale at public auction pursuant to power of sale contained therein. Said chattel mortgages, Exhibits B and C hereof, were duly foreclosed on March 15, 1956, by sale at public auction pursuant to a pledgee's power of sale and the provisions of said chattel mortgages. The property described in said deed of trust, Exhibit A hereof, and in said chattel mortgages, Exhibits B and C hereof, was at said sale offered for sale separately and as a unit and all of said property was sold to Bank of America National Trust and Savings Association.

11. No actual notice of foreclosure sales particularly set forth above was given to the defendant, United States of America, and no request for notices of sales or default was filed for record in the Office of the County Recorder, Calaveras County, California, as provided for in the California Civil Code, Section 2924b.

It was further agreed between the respective parties to this action that the following question is in issue: Whether the foreclosure and sale pursuant to said deed of trust and the foreclosure and sale of said chattel mortgages under a pledgee's power of sale and the provisions of said chattel

mortgages, gives purchaser or purchasers at said sales a title free and clear of Federal tax liens.

Dated: November 4, 1957.

/s/ OLIVER J. CARTER,
United States District Judge.

Approved as to form:

/s/ CHARLES ELMER COLLETT,
Assistant United States Attorney,
/s/ JOSEPH O. GREAVES,
Attorney, Office of Regional Counsel,
Internal Revenue Office.

SAMUEL B. STEWART,
GEORGE CHADWICK, JR.,
ELDON C. PARR.
/s/ ELDON C. PARR,
Attorney for Plaintiff.

EXHIBIT "A"

This Deed of Trust, made this 13th day of February, 1953, Between Sierra Title Company, a Corporation, as Trustor, ("Trustor" to be interpreted as "Trustors" where context requires), Corporation of America, a California corporation, as Trustee, and Bank of America National Trust and Savings Association, a national banking association, as Beneficiary,

Witnesseth: That Trustor Irrevocably Grants, Transfers and Assigns to Trustee, In Trust, With Power of Sale, the following described property

Exhibit "A"—(Continued)

situate in the ....., County of Calaveras, State of California, to-wit:

[Note: Description appearing here is the same as Exhibit A and B set out at pages 9-14 of this printed record.]

including all appurtenances and easements used in connection therewith, all water and water rights (whether riparian appropriative, or otherwise, and whether or not appurtenant) used in connection therewith, all shares of stock evidencing the same, pumping stations, engines, machinery, pipes and ditches, including also all gas, electric cooking, heating, cooling, air conditioning, refrigeration and plumbing fixtures and equipment which have been or may hereafter be attached in any manner to any building now or hereafter on the said property, or to the said property, and also the rents, issues and profits thereof, Subject, However, to the right, power and authority hereinafter given to and conferred upon the Beneficiary to collect and apply such rents, issues and profits.

For The Purpose of Securing: (1) Payment of the sum of $9,000.00 with interest thereon according to the terms of a promissory note or notes of even date herewith, made by Trustor, payable to the order of the Beneficiary, and extensions or renewals thereof; (2) payment of such additional amounts as may be hereafter loaned by Beneficiary or its successor to the Trustor or any of them, or any successor in interest of the Trustor,

Exhibit "A"—(Continued)

with interest thereon, and any other indebtedness or obligation of the Trustor, or any of them, and any present or future demands of any kind or nature which the Beneficiary or its successor may have against the Trustor, or any of them, whether created directly, or acquired by assignment, whether absolute or contingent, whether due or not, whether otherwise secured or not, or whether existing at the time of the execution of this instrument, or arising thereafter; (3) performance of each agreement of Trustor herein contained; and (4) payment of all sums to be made by Trustor pursuant to the terms hereof.

To Protect The Property and Security Granted By This Deed of Trust, Trustor Agrees:

(a) Properly to care for and keep said property and the buildings and improvements situate thereon in good condition and repair; to underpin and support, when necessary, any building or other improvement situate thereon, and otherwise to protect and preserve same; not to remove or demolish any building or improvement situate thereon; to complete or restore promptly, and in good and workmanlike manner, any building or improvement which may be constructed, damaged or destroyed thereon, and pay in full all costs incurred therefor; not to commit or permit waste of the property; to comply with all laws, covenants, conditions or restrictions affecting the property; to provide and maintain fire (and if required by Ben-

Exhibit "A"—(Continued)

eficiary, earthquake and other) insurance satisfactory to and with loss payable solely to Beneficiary, and to deliver all policies to Beneficiary, which delivery shall constitute assignment to Beneficiary of all return premiums; to appear in and defend, without cost to Beneficiary or Trustee, any action or proceeding purporting to affect the security hereunder, or the rights or powers of Beneficiary or Trustee, and, when required by Trustee or Beneficiary, to commence and maintain any action or proceeding necessary to protect such security and such rights or powers; and should Trustee or Beneficiary elect to appear in, defend, or commence and maintain any such action or proceeding, to pay all their costs and expenses, including attorney fees; to pay before delinquency, all taxes, assessments and charges affecting the property, including assessments on appurtenant water stock; to pay when due all encumbrances, charges and liens which appear to be prior or superior hereto; to pay all costs, fees and expenses of this trust; if said property be agricultural, to farm said land in an approved and husbandlike manner, and to keep all trees, vines and crops on said land properly cultivated, irrigated, fertilized, sprayed and fumigated; to replace all dead or unproductive vines or trees with new ones, and to keep all buildings, fences, ditches, canals, wells and other farming improvements on said premises in first-class condition, order and repair.

(b) Should Trustor fail to make any payment or

Exhibit "A"—(Continued)

do any act as herein provided, then Beneficiary or Trustee (but without obligation so to do, and without notice to or demand upon Trustor, and without releasing Trustor from any obligation hereunder) may make or do the same, and may pay, purchase, contest or compromise any encumbrance, charge or lien, which in the judgment of either appears to be prior or superior hereto; and in exercising any such powers, incur any liability and expend whatever amounts in its absolute discretion it may deem necessary therefor. All sums so incurred or expended by Beneficiary or Trustee shall be without demand immediately due and payable by Trustor, and shall bear interest at the rate of ten per cent per annum, and be secured hereby.

It Is Mutually Agreed That:

1. Should the property or any part thereof be taken or damaged by reason of any public improvement or condemnation proceeding, or damaged by fire or earthquake, or in any other manner, Beneficiary shall be entitled, at its option, to commence, appear in and prosecute in its own name, any action or proceeding, or to make any compromise or settlement, in connection with such taking or damage, and to obtain all compensation, awards or other relief therefor. All such compensation, awards, damages, rights of action and proceeds, including the proceeds of any policies of insurance affecting said property, are hereby assigned to Beneficiary, who may release any money so received by it, or apply

Exhibit "A"—(Continued)

the same on any indebtedness secured hereby. Trustor agrees to execute such further assignments of any compensation, award, damages and rights of action and proceeds, as Beneficiary or Trustee may require. The Trustee or Beneficiary may enter upon the property at any time during the existence of this trust for the purpose of inspection, or for the accomplishment of any of the purposes hereof.

2. By accepting payment of any sum hereby secured after its due date, or after the filing of notice of default and of election to sell, Beneficiary shall not waive its right to require prompt payment when due of all other sums so secured, or to declare default for failure so to pay, or to proceed with the sale under any such notice of default and of election to sell, for any unpaid balance of said indebtedness. If Beneficiary holds any additional security for any obligation secured hereby, it may enforce the sale thereof at its option, either before, contemporaneously with, or after the sale is made hereunder, and on any default of Trustor, Beneficiary may, at its option, offset against any indebtedness owing by it to Trustor, the whole or any part of the indebtedness secured hereby.

3. Without affecting the liability of any person, including Trustor, for the payment of any indebtedness secured hereby, or the lien of this deed of trust on the remainder of the property for the full amount of any indebtedness unpaid, Beneficiary and Trustee are respectively empowered as follows:

Exhibit "A"—(Continued)

Beneficiary may from time to time and without notice (a) release any person liable for the payment of any of the indebtedness, (b) extend the time or otherwise alter the terms of payment of any of the indebtedness, (c) accept additional security therefor of any kind, including deeds of trust or mortgages, (d) alter, substitute or release any property securing the indebtedness; Trustee may, at any time, and from time to time, upon the written request of Beneficiary (a) consent to the making of any map or plat of the property, (b) join in granting any easement or creating any restriction thereon, (c) join in any subordination or other agreement affecting this deed of trust or the lien or charge thereof, (d) reconvey, without any warranty, all or any part of the property.

4. Upon payment in full of all sums secured hereby, and performance of all obligations of the Trustor hereunder, the Trustee shall reconvey, without warranty, the estate vested in it hereby. The grantee in any reconveyance made pursuant to this deed of trust may be described as "the person or persons legally entitled thereto," and the recitals therein of any matters or facts shall be conclusive proof of the truthfulness thereof. In the event that anyone shall establish and exercise any right to develop, bore for or mine for any water, gas, oil or mineral under the surface of the property, all indebtedness secured by this Deed of Trust shall immediately become due and payable at the option of Beneficiary and any monies that may become due

Exhibit "A"—(Continued)

or payable to Trustor as royalty, rent, damages or other compensation by reason of the exercise of any such rights, are hereby assigned to Beneficiary as additional security. Upon default by Trustor in the payment of any indebtedness secured hereby, or in the performance of any agreement hereunder, or upon conveyance by Trustor of said property, or upon the divestment in any manner of his title thereto, all sums secured hereby shall immediately become due and payable at the option of the Beneficiary. In the event of default, Beneficiary shall execute or cause the Trustee to execute a written notice of such default and of its election to cause to be sold the property herein described, to satisfy the obligations secured hereby, and shall cause such notice to be recorded in the office of the Recorder of each county wherein said property, or some part thereof, is situated. Beneficiary may rescind any such notice before Trustee's sale by executing a notice of rescission and recording the same. The recordation of such notice shall constitute also a cancellation of any prior declaration of default and demand for sale, and of any acceleration of maturity of indebtedness affected by any prior declaration or notice of default. The exercise by Beneficiary of the right of recission shall not constitute a waiver of any default then existing or subsequently occurring, nor impair the right of the Beneficiary to execute other declarations of default and demand for sale, or notices of default and of election to cause the property to be sold, nor otherwise affect

Exhibit "A" —(Continued)

the note or deed of trust, or any of the rights, obligations or remedies of the Beneficiary or Trustee hereunder.

5. At least three months having elapsed between the recordation of the notice of default and the date of sale, Trustee, having first given notice of sale as then required by law, and without demand on Trustor, shall sell the property at the time and place of sale fixed by it in the notice of sale, either as a whole or in separate parcels, and in such order as the Trustee may determine, at public auction to the highest bidder for cash, in lawful money of the United States of America, payable at the time of sale. Trustee may postpone sale of all or any portion of the property by public announcement at the time of sale, and from time to time thereafter may postpone the sale by public announcement at the time fixed by the previous postponement, and without further notice it may make such sale at the time to which the same shall be so postponed. Trustee shall deliver to the purchaser its deed conveying the property so sold, but without any covenant or warranty, expressed or implied. The recital in any such deed of any matters or facts, stated either specifically or in general terms, or as conclusions of law or fact, shall be conclusive proof of the truthfulness thereof. Any person, including Trustor, Trustee or Beneficiary, may purchase at the sale. After deducting all costs, fees and expenses of Trustee and of this trust, including costs of evidence of title in connection with the sale, the Trus-

Exhibit "A"—(Continued)

tee shall apply the proceeds of the sale to the payment of all sums then secured hereby, in such order and manner as may be required by the Beneficiary; the remainder, if any, to be paid to the person or persons legally entitled thereto. If Beneficiary shall elect to bring suit to foreclose this deed of trust in the manner and subject to the provisions, rights and remedies relating to the foreclosure of a mortgage, Beneficiary shall be entitled to a reasonable sum to be fixed by the court as attorney fees expended in the prosecution of said action.

6. As additional security, Trustor hereby gives to and confers upon Beneficiary the right, power and authority, during the continuance of these Trusts, to collect all rents, issues and profits of said property, or of any personal property located thereon, with or without taking possession of the property affected hereby, reserving unto the Trustor the right, prior to any default by Trustor in payment of any indebtedness secured hereby, or in the performance of any agreement hereunder, to collect and retain such rents, issues and profits as they accrue and become payable. Upon any such default Beneficiary may at any time, without notice, either in person, by agent, or by a receiver to be appointed by a court, and without regard to the adequacy of any security for the indebtedness hereby secured, enter upon and take possession of said property or any part thereof, and in its own name sue for or otherwise collect such rents, issues and profits, including those past due and unpaid,

Exhibit "A"—(Continued)

and apply the same, less costs and expenses of operation and collection, including reasonable attorney fees, upon any indebtedness secured hereby, and in such order as Beneficiary may determine; also perform such acts of repair, cultivation, irrigation or protection, as may be necessary or proper to conserve the value of the property; also lease the same or any part thereof for such rental, term, and upon such conditions as its judgment may dictate; also prepare for harvest, harvest, remove, and sell any crops that may be growing upon the premises, and apply the proceeds thereof upon the indebtedness secured hereby. The entering upon and taking possession of said property, the collection of such rents, issues and profits, and the application thereof as aforesaid, shall not waive or cure any default or notice of default hereunder, or invalidate any act done pursuant to such notice. Trustor also assigns to Trustee, as further security for the performance of the obligations secured hereby, all prepaid rents and all monies which may have been or may hereafter be deposited with said Trustor by any lessee of the premises herein described, to secure the payment of any rent, and upon default in the performance of any of the provisions hereof, Trustor agrees to deliver such rents and deposits to the Trustee.

7. Any Trustor who is a married woman hereby expressly agrees that recourse may be had against her separate property for any deficiency after the sale of the property hereunder.

Exhibit "A"—(Continued)

8. Should proceedings be instituted to register title of the property under any land title law, Trustor will pay upon demand all sums expended by Trustee or Beneficiary, including attorney fees, and forthwith deliver to Beneficiary all evidence of title.

9. The pleading of any statute of limitations as a defense to any and all obligations secured by this deed of trust is hereby waived to the full extent permissible by law.

10. Trustor further agrees that Beneficiary may from time to time and for periods not exceeding one year, in behalf of the Trustor, renew or extend any promissory note secured hereby, and said renewal or extension shall be conclusively deemed to have been made when endorsed on said promissory note or notes by the Beneficiary in behalf of the Trustor.

11. Beneficiary may, from time to time, substitute another Trustee in the place of the Trustee herein named, to execute this trust. Upon such appointment, and without conveyance to the successor trustee, the latter shall be vested with all the title, powers and duties conferred upon the Trustee herein named. Each such appointment and substitution shall be made by written instrument executed by the Beneficiary, containing reference to this deed of trust sufficient to identify it, which, when recorded in the office of the County Recorder of the county or counties in which the property is situ-

Exhibit "A"—(Continued)

ated, shall be conclusive proof of the proper appointment of the successor trustee.

12. This deed of trust shall inure to and bind the heirs, devisees, legal representatives, successors and assigns of the parties hereto. All obligations of each Trustor hereunder are joint and several. The rights or remedies granted hereunder, or by law, shall not be exclusive, but shall be concurrent and cumulative.

If a mailing address is set forth opposite any Trustor's signature hereto, and not otherwise, the undersigned Trustor shall be deemed to have requested that a copy of any notice of default, and of any notice of sale hereunder, be mailed to said Trustor at said address.

Mailing Address For Notices
Street, City and State

SIERRA TITLE COMPANY, a California Corp., San Andreas, California.

Signature of Trustor
/s/ By JOHN J. TOUHY,
Its President,

/s/ By JOHN F. FELDMEIER,
Its Secy.

State of California,
County of Calaveras—ss.

On this 13th day of February in the year one

Exhibit "A"—(Continued)

thousand nine hundred and Fifty-three, before me, Emma Thompson, a Notary Public in and for the County of Calaveras, State of California, residing therein, duly commissioned and sworn, personally appeared John J. Touhy and John F. Feldmeier, known to me to be the President and Secretary respectively of the corporation described in and that executed the within instrument, and also known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the County of Calaveras the day and year in this certificate first above written.

s/ EMMA THOMPSON,

Notary Public in and for the County of Calaveras, State of California. My Commission Expires Sept. 6, 1955.

Deed of Trust and Assignment of Rent. Sierra Title Company, (A Corporation), Trustor, to Corporation of America, Trustee, for Bank of America National Trust and Savings Association, Beneficiary. Recorded at the Request of Sierra Title Co. Feb. 13, 1953 at 45 minutes past 2 o'clock P.M. in Book 78 Official Records pages 419-420 Calaveras County Records. Signed (Illegible) Recorder. Fee $6.00.

EXHIBIT "B"

Mortgage of Chattels
(Inanimate)

This Mortgage, made this 13th day of February, 1953, by Sierra Title Company, a Corporation, of San Andreas, County of Calaveras, State of California, by occupation ..... mortgagor (it is distinctly understood that the word "mortgagor" referring to the mortgagor, as used herein, is intended to and does includes the masculine, feminine and neuter genders and the singular and plural numbers), to Bank of America National Trust and Savings Association, a National Banking Association duly organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in the City and County of San Francisco, California, by occupation a banker, mortgagee,

Witnesseth, That said Mortgagor does hereby mortgage to said Mortgagee all the following described personal property, together with all replacements and substitutions therefor, and all repairs and additions thereto, and the increase and increment thereof, located at ..... Street, in ....., County of Calaveras, State of California, described as follows, to-wit:

[List of Personal Property appearing here is the same as Exhibit "C" set out at page 14 down to and including "1 Sawdust Burner" on page 17.]

Exhibit "B"—(Continued)

together will all other personal property which Mortgagor now owns or holds or may hereafter acquire whether the same is specifically enumerated herein or not, and located on the above described premises.

This mortgage is intended to secure and does hereby secure the payment, in lawful money of the United States of America to the said Mortgagee, at its office hereinbefore set forth, of the following:

(a) The Promissory note or notes below described, executed by Mortgagor and payable to Mortgagee:

Amount of Note: $6,000.00: Date of Note: February 1953, with interest. Payable: in Thirty-Six (36) successive monthly instalments commencing with Mar. 13, 1953.

(b) All sums that may be advanced and expenditures that may be made by the Mortgagee to or on behalf of the Mortgagor, and all indebtedness and obligations that may be incurred by the Mortgagor or any of them, to the Mortgagee, its successors or assigns, subsequent to the execution of this mortgage; also all present and future demands of any kind or nature which Mortgagee, its successors or assigns, may have against the Mortgagor or any of them, whether created directly or acquired by assignment, whether absolute or contingent, whether due or not, or whether otherwise secured or not, or whether existing at the time of the execution of this mortgage or arising thereafter; provided that the

Exhibit "B"—(Continued)

maximum amount to be secured hereby and remaining unpaid at any one time shall not exceed the total sum of Twelve Thousand and no/100 Dollars ($12,000.00).

(c) All sums or amounts that are necessarily advanced or expended by the Mortgagee, its successors or assigns, for the maintenance or preservation of the property or any part thereof described in this mortgage;

(d) All extensions or renewals, and successive extensions or renewals, of the note or notes above described, or of the indebtedness represented thereby, or of any other or further indebtedness at any time owing by Mortgagor to Mortgagee, however the same may be evidenced, and in whatever form it may be, whether represented by notes, drafts, open accounts or otherwise, and all interest thereon, for the payment of which this mortgage shall stand as a continuing security until full and complete payment shall have been made.

Said mortgagor hereby declares and hereby warrants to said mortgagee that the said mortgagor is the absolute owner and in possession of all of said mortgaged property hereinabove described, and that the said mortgaged property is free and clear of all liens, encumbrances and adverse claims whatsoever;

Said mortgagor promises and agrees: To pay the principal sum of said promissory note or notes, together with interest thereon, at the time and in the

Exhibit "B"—(Continued)

manner therein provided, and to pay when due all sums secured hereby, and to perform each and every covenant and condition of this mortgage; during the continuance hereof to properly care for and keep said mortgaged property herein described in first class condition, order and repair and insured against all loss or damage by fire and such other casualties as may be designated by the mortgagee and in amount required by the mortgagee, not to exceed, however, the value of said mortgaged property, or the amount due the mortgagee, in some insurance company, or companies, to be approved by the mortgagee, the policies of which insurance shall be payable in case of loss to the mortgagee and shall be delivered to and held by the mortgagee as security; to pay all taxes, liens or assessments of whatsoever kind or description that may be levied against said mortgaged property, or any part thereof, when the same shall become due and prior to the time when the same shall become delinquent; to comply and use said mortgaged property and each and every part thereof in strict conformity with all laws, ordinances, regulations and statutes with reference to the use, operation and registration thereof; not to remove, or permit to be removed, any part of said property from the premises on which said property is now situated, without the written consent of said mortgagee, or to sell or to attempt to sell, or further mortgage the said property without such consent, and to immediately notify the mortgagee in the event of any damage to

Exhibit "B"—(Continued)

said property from any cause whatsoever; that all replacements, substitutions, accretions, repairs and additions to, improvements, increases and increments, of said mortgaged property shall immediately become subject to all the provisions of this mortgage; to permit the mortgagee at any time during the continuance hereof to enter upon the premises on which said property is situated and examine said property and, upon demand of said mortgagee, to make a written report to said mortgagee concerning the mortgaged property; to pay the mortgagee, or its successor, in the event suit be brought to foreclose this mortgage, an attorney fee of One Hundred Dollars ($100.00) and a further sum of five per cent (5%) of the amount due in the event that said action is prosecuted to judgment.

If the mortgagor fails to make any payment or perform any act which he is obligated to perform hereby, then the mortgagee, without demand, or notice to the mortgagor, or any successor in interest of the mortgagor, or any of them, may make such payments or perform such acts and incur any liability or expend whatever amounts in its absolute discretion it may deem necessary therefor, and all sums incurred or expended by the mortgagee or its successor under the terms hereof shall immediately become due and payable by the mortgagor to the mortgagee, or its successor, when so incurred or expended and shall bear interest until paid at the rate of seven per cent (7%) per annum and shall be secured hereby.

Exhibit "B"—(Continued)

If the mortgagor defaults in the performance of any covenant contained in this mortgage, or the payment of any obligation or indebtedness secured hereby, the mortgagee, without notice or demand, at any time, may take possession of said mortgaged property and repair, care for, lease or manage the said property and perform any act necessary to conserve the value or income thereof and to apply the proceeds in the manner as specified herein upon the sale of said property. And the mortgagee, or its successor, shall be entitled to the appointment of a receiver by a court of competent jurisdiction to assist it in performing and doing any of the acts hereinabove set forth. All expenses incurred by the mortgagee in the taking possession of said property or in the performance of any of the acts hereinabove specified, including the expense of the appointment of a receiver, shall immediately become due and payable by the mortgagor to the mortgagee, or its successor, when so incurred, and shall bear interest at the rate of seven per cent (7%) per annum until paid, and shall be secured hereby.

If default is made in the prompt payment, when due, of any sum secured hereby or in the performance of any promise contained herein, the mortgagee may declare all sums secured hereby immediately due and payable without demand or notice and said mortgagee may at once proceed to foreclose this mortgage by proceeding as provided for in the Code of Civil Procedure of the State of California,

Exhibit "B"—(Continued)

or it may, at its option, enter upon the premises where said mortgaged personal property may be and take possession thereof; and take such measures as to the mortgagee may be deemed necessary or proper for the care or protection thereof and remove and/or sell and/or dispose of said mortgaged property as a pledge at either public or private sale, with or without notice (the said mortgagor hereby expressly waiving demand of performance, notice of sale and any advertisement of sale), and at said sale the mortgagee or its successor may become the purchaser and from the proceeds of sale retain all costs and charges incurred by it in the taking or sale of said property and in the care and protection thereof, including all reasonable attorney's fees incurred and may apply the balance toward the payment of all sums due said mortgagee and secured hereby and shall dispose of the surplus remaining as provided by law.

It is understood and agreed that all remedies allowed the mortgagee under the law and under the terms of this mortgage are and shall be concurrent and cumulative, and may be exercised and enforced as hereinabove and by law provided without reference to the time or manner of foreclosure or enforcement of any other security for said indebtedness whether held under deed of trust, mortgage, pledge or otherwise.

In Witness Whereof, the said mortgagor has hereunto set the hand and seal of said mortgagor

Exhibit "B"—(Continued)

the day and year first hereinabove written.

[Seal] SIERRA TITLE COMPANY,
A Corporation,

[Seal] /s/ By JOHN J. TOUHY,
President,

[Seal] /s/ By JOHN F. FELDMEIER,
Secretary.

State of California,
County of Calaveras—ss.

On this 13th day of February in the year one thousand nine hundred and Fifty-three, before me, Emma Thompson, a Notary Public in and for the County of Calaveras, State of California, residing therein, duly commissioned and sworn, personally appeared John J. Touhy and John F. Feldmeier, known to me to be the President and Secretary respectively of the corporation described in and that executed the within instrument, and also known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the County of Calaveras the day and year in this certificate first above written.

[Seal] /s/ EMMA THOMPSON,
Notary Public in and for the County of Calaveras, State of California. My Commission Expires Sept. 6, 1955.

Exhibit "B"—(Continued)

Mortgage of Chattels (Inanimate). Recorded at the Request of Sierra Title Co., Feb. 13, 1953 at 46 minutes past 2 o'clock P.M. in Book 78 of Official Records, page 421 et seq., Calaveras County Records. Signed (Illegible) Recorder. Fee $3.75.

EXHIBIT "C"

MORTGAGE OF CHATTELS

(Inanimate)

This Mortgage, made this 9th day of April, 1953, by Sierra Wood Products Corporation, a corporation, of Toyon, County of Calaveras, State of California, by occupation, Wood Products, mortgagor (it is distinctly understood that the word "mortgagor" referring to the mortgagor, as used herein, is intended to and does include the masculine, feminine and neuter genders and the singular and plural numbers), to Bank of America National Trust and Savings Association, a National Banking Association duly organized and existing under and by virtue of the laws of the United States of America, and having its principal place of business in the City and County of San Francisco, California, by occupation a banker, mortgagee,

Witnesseth: That said Mortgagor does hereby mortgage to said Mortgagee all the following described personal property, together with all replacements and substitutions therefor, and all repairs and additions thereto, and the increase and incre-

Exhibit "C"—(Continued)

ment thereof, located at ..... Street, in Toyon, County of Calaveras, State of California, described as follows, to wit:

Turner 42" Tandem Twin Band Resaw with Bevelling and Rounding Attachments. Machine Serial #RB561: 2 HP Sterling Speed Trol: Allis Chalmers 5 HP Bevelling Motor, Serial #225: Two Allis Chalmers 30 HP Main Drive Motors, Serial #588587 & #588594.

Turner 42" Tandem Twin Band Resaw, Serial #563, with Turner Ripping Attachment, Serial #A471: 2 HP Sterling Speed Trol: Two Westinghouse 30 HP Main Drive Motors, Serial #4807, Style 1441939: General Electric 15 HP Profile Motor #PE2390.

This mortgage is intended to secure and does hereby secure the payment, in lawful money of the United States of America to the said Mortgagee, at its office hereinbefore set forth, of the following:

(a) The Promissory note or notes below described, executed by Mortgagor and payable to Mortgagee:

Amount of Note: $7,500.00; Date of Note: April 9, 1953; with interest. Payable: One Thousand Two Hundred Fifty and No 100 Dollars ($1,250.00) on the 9th day of October, 1953, plus interest at the rate of Six per cent (6%) and One Thousand Two Hundred Fifty and No 100 Dollars ($1250.00) on the 9th day of each and every April and October

Exhibit "C"—(Continued)

until the 9th day of April, 1956, on which said date the entire balance of principal and interest then unpaid shall become due and payable.

(b) All sums that may be advanced and expenditures that may be made by the Mortgagee to or on behalf of the Mortgagor, and all indebtedness and obligations that may be incurred by the Mortgagor or any of them, to the Mortgagee, its successors or assigns, subsequent to the execution of this mortgage; also all present and future demands of any kind or nature which Mortgagee, its successors or assigns, may have against the Mortgagor or any of them, whether created directly or acquired by assignment, whether absolute or contingent, whether due or not, or whether otherwise secured or not, or whether existing at the time of the execution of this mortgage or arising thereafter; provided that the maximum amount to be secured hereby and remaining unpaid at any one time shall not exceed the total sum of Fifteen Thousand and No/100 Dollars ($15,000.00).

(c) All sums or amounts that are necessarily advanced or expended by the Mortgagee, its successors or assigns, for the maintenance or preservation of the property or any part thereof described in this mortgage;

(d) All extensions or renewals, and successive extensions or renewals, of the note or notes above described, or of the indebtedness represented thereby, or of any other or further indebtedness at

Exhibit "C"—(Continued)

any time owing by Mortgagor to Mortgagee, however the same may be evidenced, and in whatever form it may be, whether represented by notes, drafts, open accounts or otherwise, and all interest thereon, for the payment of which this mortgage shall stand as a continuing security until full and complete payment shall have been made.

Said mortgagor hereby declares and hereby warrants to said mortgagee that the said mortgagor is the absolute owner and in possession of all of said mortgaged property hereinabove described, and that the said mortgaged property is free and clear of all liens, encumbrances and adverse claims whatsoever;

Said mortgagor promises and agrees: To pay the principal sum of said promissory note or notes, together with interest thereon, at the time and in the manner therein provided, and to pay when due all sums secured hereby, and to perform each and every covenant and condition of this mortgage; during the continuance hereof to properly care for and keep said mortgaged property herein described in first class condition, order and repair and insured against all loss or damage by fire and such other casualties as may be designated by the mortgagee and in amount required by the mortgagee, not to exceed, however, the value of said mortgaged property, or the amount due the mortgagee, in some insurance company, or companies, to be approved by the mortgagee, the policies of which insurance shall be payable in case of loss to the mortgagee

Exhibit "C"—(Continued)

and shall be delivered to and held by the mortgagee as security; to pay all taxes, liens or assessments of whatsoever kind or description that may be levied against said mortgaged property, or any part thereof, when the same shall become due and prior to the time when the same shall become delinquent; to comply and use said mortgaged property and each and every part thereof in strict conformity with all laws, ordinances, regulations and statutes with reference to the use, operation and registration thereof; not to remove, or permit to be removed, any part of said property from the premises on which said property is now situated, without the written consent of said mortgagee, or to sell or to attempt to sell, or further mortgage the said property without such consent, and to immediately notify the mortgagee in the event of any damage to said property from any cause whatsoever; that all replacements, substitutions, accretions, repairs and additions to, improvements, increases and increments, of said mortgaged property shall immediately become subject to all the provisions of this mortgage; to permit the mortgagee at any time during the continuance hereof to enter upon the premises on which said property is situated and examine said property and, upon demand of said mortgagee, to make a written report to said mortgagee concerning the mortgaged property; to pay the mortgagee, or its successor, in the event suit be brought to foreclose this mortgage, an attorney fee of One Hundred Dollars ($100.00) and a further sum of

Exhibit "C"—(Continued)

five per cent (5%) of the amount due in the event that said action is prosecuted to judgment.

If the mortgagor fails to make any payment or perform any act which he is obligated to perform hereby, then the mortgagee, without demand, or notice to the mortgagor, or any successor in interest of the mortgagor, or any of them, may make such payments or perform such acts and incur any liability or expend whatever amounts in its absolute discretion it may deem necessary therefor, and all sums incurred or expended by the mortgagee or its successor under the terms hereof shall immediately become due and payable by the mortgagor to the mortgagee, or its successor, when so incurred or expended and shall bear interest until paid at the rate of seven per cent (7%) per annum and shall be secured hereby.

If the mortgagor defaults in the performance of any covenant contained in this mortgage, or the payment of any obligation or indebtedness secured hereby, the mortgagee, without notice or demand, at any time, may take possession of said mortgaged property and repair, care for, lease or manage the said property and perform any act necessary to conserve the value or income thereof and to apply the proceeds in the manner as specified herein upon the sale of said property. And the mortgagee, or its successor, shall be entitled to the appointment of a receiver by a court of competent jurisdiction to assist it in performing and doing any of the acts

Exhibit "C"—(Continued)

hereinabove set forth. All expenses incurred by the mortgagee in the taking possession of said property or in the performance of any of the acts hereinabove specified, including the expense of the appointment of a receiver, shall immediately become due and payable by the mortgagor to the mortgagee, or its successor, when so incurred, and shall bear interest at the rate of seven per cent (7%) per annum until paid, and shall be secured hereby.

If default is made in the prompt payment, when due, of any sum secured hereby or in the performance of any promise contained herein, the mortgagee may declare all sums secured hereby immediately due and payable without demand or notice and said mortgagee may at once proceed to foreclose this mortgage by proceeding as provided for in the Code of Civil Procedure of the State of California, or it may, at its option, enter upon the premises where said mortgaged personal property may be and take possession thereof; and take such measures as to the mortgagee may be deemed necessary or proper for the care or protection thereof and remove and/or sell and/or dispose of said mortgaged property as a pledge at either public or private sale, with or without notice (the said mortgagor hereby expressly waiving demand of performance, notice of sale and any advertisement of sale), and at said sale the mortgagee or its successor may become the purchaser and from the proceeds of sale retain all costs and charges incurred by it in the taking or sale of said property and in

Exhibit "C"—(Continued)

the care and protection thereof, including all reasonable attorney's fees incurred and may apply the balance toward the payment of all sums due said mortgagee and secured hereby and shall dispose of the surplus remaining as provided by law.

It is understood and agreed that all remedies allowed the mortgagee under the law and under the terms of this mortgage are and shall be concurrent and cumulative, and may be exercised and enforced as hereinabove and by law provided without reference to the time or manner of foreclosure or enforcement of any other security for said indebtedness whether held under deed of trust, mortgage, pledge or otherwise.

In Witness Whereof, the said mortgagor has hereunto set the hand and seal of said mortgagor the day and year first hereinabove written.

[Seal] SIERRA WOOD PRODUCTS CORPORATION,
A Corporation,
[Seal] /s/ By JOHN J. TOUHY,
[Seal] /s/ By JOHN F. FELDMEIER.

State of California,
County of Calaveras—ss.

On this 17th day of April in the year one thousand nine hundred and Fifty-three, before me, Emma Thompson, a Notary Public in and for the County of Calaveras, State of California, residing

Exhibit "C"—(Continued)

therein, duly commissioned and sworn, personally appeared John J. Touhy and John F. Feldmeier, known to me to be the President and Assistant Secretary of the corporation described in and that executed the within instrument, and also known to me to be the persons who executed the within instrument on behalf of the corporation therein named, and acknowledged to me that such corporation executed the same.

In Witness Whereof I have hereunto set my hand and affixed my official seal in the County of Calaveras the day and year in this certificate first above written.

[Seal] /s/ EMMA THOMPSON,
Notary Public in and for the County of Calaveras, State of California. My Commission Expires Sept. 6, 1955.

Mortgage of Chattels (Inanimate). Sierra Wood Products Corporation, a corporation, Mortgagor, to Bank of America National Trust and Savings Association, Stockton Main Office, Stockton, Mortgagee. Dated April 9, 1953. Filed for record at the request of Bank of America National Trust and Savings Association. Recorded at request of Sierra Title Co., April 20, 1953, at 40 minutes past 1 o'clock P.M. in Book 74 of Official Records, page 491 et seq., Calaveras County Records. Signed (Illegible) Recorder, by Signed (Illegible) Deputy. Fee $2.75.

[Endorsed]: Filed October 21, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION

To the Defendant Above Named and to Lloyd H. Burke, United States Attorney, Charles Elmer Collett, Assistant United States Attorney, Joseph O. Greaves, Attorney, Office of Regional Counsel, Internal Revenue Service, Its Attorneys:

You and Each of You Will Please Take Notice that the undersigned will move this court in the courtroom of the Master Calendar Judge, in the U. S. Post Office Building, 7th and Mission Streets, San Francisco, California, on November 4, 1957, at 9:30 a.m., or as soon thereafter as counsel can be heard, for an Order pursuant to Rule 56 of the Federal Rules of Civil Procedure for summary judgment in accordance with the prayer of the complaint on file herein on the ground that no genuine issue as to any material fact exists and that plaintiff is entitled to judgment as a matter of law.

Said motion will be made and based upon the pleadings, papers and Pre-trial Order on file herein.

Dated: October 24, 1957.

SAMUEL B. STEWART,
GEORGE CHADWICK, JR.,
ELDON C. PARR,
/s/ By ELDON C. PARR,
Attorneys for Plaintiff.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed October 25, 1957.

[Title of District Court and Cause.]

NOTICE OF MOTION

To: Samuel B. Stewart, George Chadwick, Jr., Eldon C. Parr, 300 Montgomery Street, San Francisco 4, California, Attorneys for Plaintiff.

Please take notice that the undersigned will on Monday, November 4, 1957, at the hour of 9:30 a.m., in the courtroom of the United States District Judge presiding over the law and Motion Calendar, United States Court House and Post Office Building, 7th and Mission Streets, San Francisco, California, move for summary judgment dismissing the complaint on the ground that the defendant, United States of America, is entitled to judgment as a matter of law.

LLOYD H. BURKE,
United States Attorney,
/s/ By CHARLES ELMER COLLETT,
Assistant United States Attorney,
/s/ JOSEPH O. GREAVES,
Attorney, Office of Regional Counsel, Internal Revenue Service.

[Title of District Court and Cause.]

MOTION FOR SUMMARY JUDGMENT

Comes now the United States of America, by and through its undersigned attorneys, and pursuant to Rule 56(a), Federal Rules of Civil Procedure, moves for summary judgment dismissing the complaint in the above-entitled action.

The pleadings in the case and the Pre-Trial Order set forth all necessary and material facts. There being no issue of fact, the defendant moves for judgment dismissing the complaint, on the grounds that the defendant, United States of America, is entitled to judgment as a matter of law.

LLOYD H. BURKE,
United States Attorney,
/s/ By CHARLES ELMER COLLETT,
Assistant United States Attorney,
/s/ JOSEPH O. GREAVES,
Attorney, Office of Regional Counsel, Internal Revenue Service.

Affidavit of Service by Mail Attached.

[Endorsed]: Filed October 28, 1957.

[Title of District Court and Cause.]

ORDER GRANTING PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

This matter having been argued, briefed and submitted for decision,

It Is Ordered that judgment be entered in favor of plaintiff on the authority of United States v. Boyd, 246 F.2d 477, certiorari denied December 9, 1957.

Plaintiff shall prepare findings of fact, conclusions of law and judgment in accordance with this order.

Dated: December 26, 1957.

/s/ GEO. B. HARRIS,
U. S. District Judge.

[Endorsed]: Filed December 26, 1957.

In The United States District Court, Northern District of California, Southern Division

No. 36485

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, Plaintiff,

vs.

UNITED STATES OF AMERICA, Defendant.

JUDGMENT

A motion of the Plaintiff above named for summary judgment in its favor in accordance with the prayer of the complaint on file herein having been duly brought on to be heard, and a motion by the Defendant above named for summary judg-

ment in its favor dismissing the action having been duly brought on to be heard, and the Court having made an order pursuant thereto granting Plaintiff's motion and directing that judgment be entered herein in favor of Plaintiff;

It Is Ordered, Adjudged and Decreed:

(1) That Defendant's motion for summary judgment be, and the same is hereby denied;

(2) That Plaintiff's motion for summary judgment be, and the same is hereby granted;

(3) That Plaintiff is the owner of the real property situate, lying and being in the County of Calaveras, State of California, bound and particularly described as follows:

> [Descriptions are the same as set out at pages 9-14 of this printed record.]

and Defendant has no estate, lien, right, title or interest whatever in or to said real property, and Defendant is forever barred and enjoined from asserting any claim whatever in or to said real property adverse to Plaintiff:

(4) Plaintiff is the owner of the following described personal property located in the County of Calaveras, State of California:

> [List of Personal Property is the same as set out at page 14 down to and including 1 "Sawdust Burner" on page 17.]

and Defendant has no estate, lien, right, title or interest whatever in or to said personal property,

and Defendant is forever barred and enjoined from asserting any claim whatever in or to said personal property adverse to Plaintiff.

Dated Jan. 20, 1958.

/s/ GEO. B. HARRIS,
United States District Judge.

Approved as to form.

/s/ CHARLES ELMER COLLETT,
Assistant United States Attorney,
/s/ JOSEPH O. GREAVES,
Attorney, Office of Regional Counsel,
Internal Revenue Service.

SAMUEL B. STEWART,
GEORGE CHADWICK, JR.,
ELDON C. PARR.
/s/ ELDON C. PARR,
Attorney for Plaintiff.

Entered in Civil Docket 1 20/58.

[Endorsed]: Filed January 20, 1958.

[Title of District Court and Cause.]

NOTICE OF APPEAL

Notice is hereby given that the United States of America appeals to the United States Court of Appeals for the Ninth Circuit from the judgment in the above entitled action, dated and filed January 20, 1958.

LLOYD H. BURKE,
United States Attorney,
s/ By CHARLES ELMER COLLETT,
Assistant United States Attorney,
/s JOSEPH O. GREAVES,
Office of Regional Counsel,
Internal Revenue Service.

Affidavit of Mailing Attached.

[Endorsed]: Filed March 12, 1958.

[Title of District Court and Cause.]

EXCERPT FROM DOCKET ENTRIES

1957

May 27—Filed petition on removal from Superior Court, County of Calaveras with copy of — complaint & summons.

July 10—Filed answer of United States.

Aug. 19—Filed notice by plaintiff of motion for pre-trial, Aug. 26, 1957.

Aug. 26—Ordered after hearing, motion granted and case assigned for pre-trial Sept. 20, 1957. (Goodman.)

1957

Sep. 20—Pre-trial conference completed. Counsel to present order. (Carter.)

Oct. 24—Filed pre-trial order. (Carter.)

Oct. 25—Filed notice by plaintiff of motion for summary judgment, Nov. 4, 1957 with memo.

Oct. 28—Filed notice & motion by deft. for summary judgment, Nov. 4, 1957 with memo.

Nov. 4—Ordered motion for summary judgment continued to Nov. 12, 1957. (Harris.)

Nov. 12—Ordered after hearing, memos. to be filed in 10 days and motions to dismiss and for summary judgment continued to Nov. 22, 1957 for submission. (Harris.)

Nov. 18—Filed memo. of deft. in opposition to motion for summary judgment.

Nov. 21—Filed suppl. memo. of plaintiff in support of motion for summary judgment.

Nov. 22—Ordered case submitted. (Harris.)

Dec. 26—Filed order granting motion of plaintiff for summary judgment. Counsel to prepare findings, conclusions & judgment. (Harris.)

Dec. 27—Mailed copies order to counsel.

1958

Jan. 20—11 AM Entered summary judgment—filed Jan. 20, 1958—for plaintiff, that plaintiff is owner of real estate involved herein and personal property as set forth and deft. has no estate therein. Deft. permanently enjoined from asserting any claim whatever thereto. (Harris.)

1958

Jan. 20—Mailed notices.

Mar. 12—Filed notice of appeal by USA.

Mar. 12—Mailed notices.

Apr. 16—Filed order extending time to docket appeal to June 6, 1958. (Harris.)

May 27—Filed appellant's designation of record on appeal.

[Title of District Court and Cause.]

CERTIFICATE OF CLERK

I, C. W. Calbreath, Clerk of the United States District Court for the Northern District of California, hereby certify the foregoing and accompanying documents, listed below, are the originals filed in this Court in the above-entitled case and constitute the record on appeal herein, as designated by the Attorneys for the Appellant:

Petition for Removal with copy of Complaint and Summons.

Answer of United States of America.

Pre-trial order.

Notice and Motion by plaintiff for Summary Judgment.

Notice and Motion by defendant for Summary Judgment.

Order Granting Motion of Plaintiff for Summary Judgment.

Judgment.

Notice of Appeal.

Order Extending Time to File Designation.

Designation of Record by Appellant.

In Witness Whereof, I have hereunto set my hand and affixed the seal of said District Court this 29th day of May, 1958.

[Seal] C. W. CALBREATH,
Clerk,
/s/ By MARGARET P. BLAIR,
Deputy.

[Endorsed]: No. 16034. United States Court of Appeals for the Ninth Circuit. United States of America, Appellant, vs. Bank of America National Trust & Savings Association, a national banking association, Appellee. Transcript of Record. Appeal from the United States District Court for the Northern District of California, Southern Division.

Filed: May 29, 1958.

/s/ PAUL P. O'BRIEN,
Clerk of the United States Court of Appeals for the Ninth Circuit.

In the United States Court of Appeals
for the Ninth Circuit

No. 16034

UNITED STATES OF AMERICA, Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION,

Appellee.

APPELLANT'S AMENDED STATEMENT OF POINTS

Comes now appellant, the United States of America, and cites the following points upon which it intends to rely for reversal of the judgment of the District Court:

1. The District Court lacked jurisdiction to hear and determine the suit instituted by the plaintiff-appellee against the United States.

2. Assuming that the District Court had jurisdiction, it erred in holding that a junior federal tax lien may be extinguished by a non-judicial sale by a mortgagee under a contractual power of foreclosure.

LLOYD H. BURKE,
United States Attorney,
/s/ By LYNN J. GILLARD,
Assistant U. S. Attorney.

Certificate of Service Attached.

[Endorsed]: Filed June 16, 1958. Paul P. O'Brien, Clerk.

[fol. 66]
IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

Minute entry of argument and submission—November 4, 1958 (omitted in printing).

[fol. 67]
IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION AND FILING AND RECORDING OF JUDGMENT—February 2, 1959

Ordered that the typewritten opinion this day rendered by this Court in above cause be forthwith filed by the Clerk, and that a Judgment be filed and recorded in the minutes of the Court in accordance with the opinion rendered.

[fol. 68]
IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16,034

UNITED STATES OF AMERICA, Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division.

Before: HEALY and CHAMBERS, Circuit Judges, and JAMESON, District Judge

OPINION—February 2, 1959

JAMESON, District Judge:

Appellee was the owner and holder of a deed of trust and two chattel mortgages executed on February 13th and April

9th, 1953, covering property of Sierra Wood Products Corporation. In February and April, 1954, appellant filed notices of lien for unemployment withholding taxes owed by this corporation. Upon default in the performance of the obligations secured by the deed of trust and chattel mortgages, appellee foreclosed the trust deed pursuant to power of sale therein contained and the chattel mortgages pursuant to a pledgee's power of sale and the provisions of the chattel mortgages. It was stipulated that all "necessary and proper procedures" for these foreclosures "were duly performed," and the property was sold at public auction on March 15th, 1956. No actual notice of the sale was given appellant, and no request for notices of sales or default was filed for record as provided in Cal. Civ. Code § 2924(b).[1] [fol. 69] On May 3, 1957, appellee instituted this action to quiet title in the Superior Court of the State of California, in and for the County of Calaveras. Appellant removed to the United States District Court for the Northern District of California, Southern Division, pursuant to 28 U.S.C.A. § 1444. Both parties filed motions for summary judgment. The District Court granted the motion of appellee and entered judgment decreeing the liens of the United States extinguished.

Two contentions were advanced by appellant: (1) that the District Court lacked jurisdiction; and (2) assuming jurisdiction, the court erred in holding that a junior federal tax lien may be extinguished by a non-judicial sale by a mortgagee under a contractual power of foreclosure.

The California Constitution conferred jurisdiction of the subject matter upon the Superior Court of Calaveras County.[2] By 28 U.S.C.A. § 2410, the United States con-

[1] This section provides for filing request for a copy of notices of default and sale under deed of trust with power of sale and for mailing copy of such notices to person filing request.

[2] "The Superior Court shall have original jurisdiction in all civil cases and proceedings (except as in this article otherwise provided • • •) • • •

"• • • all actions for the recovery of the possession of, quieting title to, or for the enforcement of liens upon real estate, shall be commenced in the county in which the real estate, or any part thereof, affected by such action or actions, is situated. • • •" (Article VI, Sec. 5).

sented to be sued in the State Court.[3] The District Court acquired jurisdiction upon removal pursuant to 28 U.S.C.A. § 1444.[4]

It is true, as the Government contends, that Section 2410 does not confer jurisdiction upon district courts to entertain quiet title actions, but simply waives sovereign im- [fol. 70] munity from suit.[5] Nor may federal jurisdiction be predicated merely on the fact that the United States is a party.[6] Here, however, the state court in which the action was instituted had jurisdiction, and appellant invoked jurisdiction in the federal courts by removal.

Appellant contends that the remedy provided in Section 7424, Int. Rev. Code of 1954[7] is the exclusive method of clearing title to property covered by a federal tax lien. This section provides that the holder of a prior lien or interest of record "or any person purchasing the property at a sale to satisfy such prior lien or interest," may make written request to the Secretary or his delegate to authorize the filing of a civil action as provided in Section 7403.[8] If suit is not authorized within six months, "such person or purchaser" may file a petition in a United States District Court for leave to file a civil action for a final determination of all claims to or liens upon the property. After a full hear-

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[3] "Under the conditions prescribed in this section and section 1444 of this title * * * the United States may be named a party in any civil action or suit . . . in any state court having jurisdiction of the subject matter, to quiet title to or for the foreclosure of a mortgage or other lien upon real or personal property on which the United States has or claims a mortgage or other lien." (§ 2410 (a)).

[4] "Any action brought under section 2410 of this title against the United States in any state court may be removed by the United States to the district court of the United States for the district and division in which the action is pending." (§ 1444).

[5] Wells v. Long, 9 Cir. 1947, 162 F. 2d 842; Seattle Association of Credit Men, 9 Cir. 1957, 240 F. 2d 906.

[6] Wells v. Long, 9 Cir. 1947, 162 F. 2d 842.

[7] 26 U.S.C.A. § 7424.

[8] 26 U.S.C.A. § 7403, which provides for civil action in a district court of the United States to enforce federal tax liens.

ing, the district court "may in its discretion" enter an order granting leave to file such civil action, in which the United States and all persons having liens upon or claiming any interest in the property shall be made parties.

28 U.S.C.A. § 2410[9] specifically provides that the United States may be named as a party defendant in an action to quiet title or foreclose a mortgage on which the United States has a mortgage "or other lien." It provides in subsection (d) that the holder of a lien upon property on which the United States has a "junior lien other than a tax lien" may make written request to have the lien extinguished in the same manner as a tax lien. This provision in subsection (d) clearly implies that subsections (a), (b) and (c) are general in nature and include tax liens.

Under Section 2410 as originally enacted in 1931, the United States gave the holder of a mortgage on real prop- [fol. 71] erty, subject to a government lien, an additional remedy by consenting to be made a defendant in a suit to foreclose the mortgage. The provisions of the 1931 Act were expanded in 1942 to include actions to quiet title to real and personal property and actions to foreclose liens on personal property.[9]

The provisions of Section 7424, Int. Rev. Code of 1954, were first enacted in Section 1030, Int. Rev. Code of 1924, and reenacted in Section 1127 of the Revenue Act of 1926 and Section 3679, Int. Rev. Code of 1939. The Codes of 1939 and 1954 both contained express cross-references to Section 2410.[10] It is our conclusion that Section 7424, Int. Rev. Code of 1954 and Section 2410 of Title 28 prescribe alternative remedies for removal of a federal tax lien.

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[9] The provisions of Section 2410 were originally enacted as the Act of March 4, 1931, c. 515, 46 Stat. 1528; expanded by the Act of Dec. 2, 1942, c. 656, 56 Stat. 1026; and the present law enacted by Act of June 25, 1948, c. 464, 62 Stat. 869, and amended by Act of May 24, 1949, c. 139, § 119, 63 Stat. 105.

[10] Section 3680 of 1939 Code and Section 7425 of 1954 Code, which reads: "(5) For provisions permitting the United States to be made party defendant in a proceeding in a state court for the foreclosure of a lien upon real estate where the United States may have claim upon the premises involved, see Section 2410 of Title 28 of the United States Code."

In addition, administrative procedures are set forth in Section 6325, Int. Rev. Code of 1954, whereby the Secretary of the Treasury or his delegate may release the lien where the liability is satisfied, a bond is furnished, or the interest of the United States is determined to have no value.

Appellee here proceeded under Section 2410 of Title 28. It contends that the tax lien was extinguished by the sale held under the power of sale in the trust deed and chattel mortgages, and that this action merely seeks to quiet title to property upon which the lien has already been extinguished. The Government contends that Section 2410 requires a judicial sale, relying upon the provisions of subsection (c), which contemplate a "judicial sale" on foreclosure, give the United States, in case of real property, one year within which to redeem, and provide that the United States may ask by way of affirmative relief for foreclosure of its own lien.[11] The Bank argues that subsection (c) relates only to foreclosure actions and not to quiet title actions.

[fol. 72] The federal tax lien here involved was created by Section 3670, Int. Rev. Code of 1939 (Section 6321 of 1954 Code) which provides that "if any person liable to pay any tax neglects or refuses to pay the same after demand, the amount" (with interest, penalty and costs) "shall be a lien in favor of the United States upon all property, whether real or personal, belonging to such person." Section 3670 "creates no property rights but merely attaches consequences, federally defined, to rights created under state law."[12] "However, once it has been determined that state law creates sufficient interests * * * to satisfy the require-

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[11] Section 2410 (c) reads in part: "A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. * * * Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United States shall have one year from the date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien * * *."

[12] United States v. Bess, 357 U. S. 51, 57, 2 L. Ed. 2d 1135, 78 S. Ct. 1054 (1958).

ments of § 3670, state law is inoperative to prevent the attachment of liens created by the United States." [13] And, as this Court said in Bank of Nevada v. United States, 1957, 251 F. 2d 820, 824, cert. den. 356 U.S. 938, 2 L. Ed. 2d 813, 78 S. Ct. 780, the Supreme Court has repeatedly and emphatically stated that Federal tax liens and the provisions for their collection are strictly Federal and strictly statutory."

The federal tax lien attached to "all property and rights to property" belonging to the taxpayer. The interest of a taxpayer at the time the liens attached was subject to defeasance under state law upon exercise of power of sale contained in the deed of trust.[14] But can a federal tax lien upon a mortgagor's interest in property be extinguished by the exercise of such a power of sale?

There is a conflict of authority on this question. Metropolitan Life Ins. Co. v. United States, 6 Cir. 1939, 107 F. 2d [fol. 73] 311, cert. den. 310 U.S. 630, 84 L. Ed. 1400, 60 S. Ct. 978, tends to support the Government's position. There, a suit was brought under R.S. § 3207, a predecessor of Section 7424, asking that a junior federal tax lien be decreed extinguished by reason of a sale of property pursuant to a power contained in the mortgage. The District Court held that the Government's lien had not been extinguished and ordered the property sold and the proceeds first applied to the mortgagee's claims and the balance, if any, paid to the Government. The Court of Appeals affirmed on the theory that the District Court had no jurisdiction to extinguish the lien other than by judicial sale, and said that the question was not "what binding effect the power of sale conferred by the mortgage had on subsequent lienors." However, it is evident from the opinion that the court did not consider the lien extinguished. The court stated that "federal statutes create specific liens for taxes and as a corollary give a specific remedy for their removal, and when such liens once attach, they may be lifted only as provided thereunder."

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[13] Id. at 56, 57. See also Fidelity & Deposit Co. v. New York City Housing Auth., 2 Cir. 1957, 241 F. 2d 142, 144.

[14] Carpenter v. Smallpage, 220 Cal. 129, 29 P. 2d 841 (1934); Streiff v. Darlington, 9 Cal. 2d 42, 68 P. 2d 728 (1937).

(107 F. 2d at 313). "The United States as a sovereign may be sued only with its consent. It follows that the Congress has the power to prescribe not only the methods by which, and the conditions under which, tax liens on real estate may be released, but also to limit the right to sue therefore and no suit may be maintained against the United States for such purpose unless strictly within the terms of the Statute . . . , under which consent is given." 107 F. 2d at 314.[15]

On the other hand, the Fifth Circuit in United States v. Boyd, 1957, 246 F. 2d 477, cert. den. 355 U.S. 889, 2 L. Ed. 2d 188, 78 S. Ct. 261, held that the non-judicial foreclosure of a mortgage lien pursuant to a valid power of sale extinguished a federal tax lien which was inferior to the mortgage lien, and the able trial judge held for appellant on the basis of this decision. In United States v. Boyd, the court said: "The result is that when a mortgage has been validly foreclosed by a non-judicial sale under a power, it is the consequence of such prior lien and the right of enforcement under it which destroys the junior encumbrance whether it be a private or a federal tax lien. The extinguishment or destruction of the junior lien comes from [fol. 74] the nature of the superior lien and not from a later subsequent equity determination (whether under 28 U.S. C.A. § 2410, or Section 7403, or a 7424 proceeding) that this has been the effect of enforcement of the senior lien. Consequently, when the superior lien has been validly foreclosed, it cuts off all junior liens, including those of the Government." 246 F. 2d at 483.[16]

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[15] United States v. Kensington Shipyard & Drydock Corp., 3 Cir. 1948, 169 F. 2d 9, also tends to support the Government's position.

[16] The dissenting opinion in the Metropolitan Life case succinctly expresses the rationale of the appellee: "I am in general accord with the view of the majority as to the plenary nature of the federal power of taxation. However, I cannot concede that this power enables the United States to acquire a lien upon any greater property interest than its tax debtor owns. In the case at bar, the interest of the tax bidder was subject to destruction by exercise of the power of sale . . . The tax lien attaches only to the destructible interest that remains in a mortgagor after execution of a mortgage with a power of sale." See also United States v. Cless, 3 Cir. 1958, 254 F. 2d 590; United States v. Brosnan, W.D. Pa. 1958, 164 F. Supp. 357.

In spite of its holding that the tax lien was extinguished by the non-judicial sale, the Boyd case gave effect to the provisions of § 2410(c), the court calling attention to the fact that the District Court had "read the statutes of the United States as a composite body to allow to the Government * * * the statutory right to redeem after the sale within one year." The Court of Appeals said further, "The Government's rights have been fully preserved by the right of redemption which continues for the full year, not counting the time it has been suspended during the pendency of this appeal * * *."

This portion of the Boyd opinion is criticized by both parties. The Bank argues that it was not necessary to the decision and, in effect, is inconsistent with the conclusion that the lien was extinguished. The Government suggests that since the action was not conducted under Section 2410 (but rather under Section 7403), "it is difficult to understand" how the redemption provisions of Section 2410(c) "could have any application."

We are unable to reconcile the conclusions in the Boyd case (1) that the lien was extinguished and (2) that the Government still had a right to redeem under Section 2410 (c).

The Bank argues that the government lien attached only to the property rights of the taxpayer, and since those [fol. 75] rights were subject to defeasance under the prior trust deed, the lien was subject to foreclosure in the manner prescribed in the trust deed. The Government contends that once the lien attached to the property it could be removed only in a manner prescribed by Congress, relying upon the rule that the enforcement and removal of the lien are governed by federal rather than state law.

While the question is close, we are persuaded that the Government's position is correct. It is not enough to say that the tax lien attached only to the taxpayer's interest in the property which was subject to defeasance by a sale. Once the lien attached to the property, the Government had a right in the property which could not be divested by the contractual provisions in the deed of trust which would permit the federal tax lien to be extinguished by a sale to which the Government was not a party and did not have notice.

Rather, the Government's lien could be divested only in a manner prescribed by Congress. The Bank seeks to clear title under Section 2410. It would avoid the effect of subsection (c) by foreclosing under power of sale and then instituting an action to quiet title. It is conceded that in a foreclosure action under Section 2410 a judicial sale would be required and the Government would have a right of redemption. May the Bank do indirectly what it could not do directly?

In our opinion a compliance with subsection "(c)" is a condition of the Government's consent to be sued under Section 2410. Subsection (c) requires (1) a judicial proceeding in which the Government may assert its lien; and (2) the right of redemption within one year from the date of sale. Many states do not provide any period of redemption, so that regardless of the method of foreclosure, the Government often has a right not available to private lien holders. This is an express condition of the Government's consent to be sued.

Appellee is not without remedy. Its interest in the property to the extent of the amount due under the trust deed and mortgages remains prior to the federal lien.[17] It can commence an action to remove the lien under Section 7424 of the Internal Revenue Code of 1954. It can file an appli- [fol. 76] cation with the District Director of Internal Revenue for an administrative discharge of the property from tax liens under Section 6325(b) of Title 26, U.S.C.A. It can also bring a foreclosure suit joining the United States under 28 U.S.C.A. § 2410. To hold for the appellee would divest the United States of its interest in property without its consent and without giving it an opportunity to obtain the amount, if any, by which the value of the property exceeds the amount of the prior lien.

Judgment reversed.

[File endorsement omitted]

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[17] The Federal tax lien is effective only as to that portion of the value exceeding the amount of the mortgages and deed of trust.

[fol. 77]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16,034

UNITED STATES OF AMERICA, Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, Appellee.

Appeal from the United States District Court for the Northern District of California, Southern Division

JUDGMENT—Filed and entered: February 2, 1959

This cause came on to be heard on the transcript of the record from the United States District Court for the Northern District of California, Southern Division, and was duly submitted.

On consideration whereof, it is now here ordered and adjudged by this Court, that the Judgment of the said District Court in this cause be, and hereby is reversed.

[fol. 78]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

MINUTE ENTRY OF ORDER DIRECTING FILING OF OPINION ON PETITION FOR REHEARING—May 1, 1959

Ordered that the typewritten opinion this day rendered by this Court in above cause on petition for rehearing, be forthwith filed by the Clerk.

[fol. 79]

IN UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No. 16,034

UNITED STATES OF AMERICA, Appellant,

vs.

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a national banking association, Appellee.

OPINION ON PETITION BY APPELLEE FOR REHEARING—
May 1, 1959

Before: HEALY and CHAMBERS, Circuit Judges, and JAMESON, District Judge

JAMESON, District Judge:

Upon consideration of appellee's petition for rehearing, we have concluded that our opinion, and particularly the next to the last paragraph, requires clarification. The following is supplemental to the original opinion:

It is well settled that "a proceeding against property in which the United States has an interest is a suit against the United States."[1] It is our view that a tax lien, even though junior to a mortgage, is such an interest in property,[2] and may be divested only with the consent of the [fol. 80] United States and in the manner prescribed by Congress.

[1] United States v. Alabama, 1941, 313 U.S. 274, 282, 61 S.Ct. 1101, 85 L.Ed. 1327. See also The Siren, 1868, 7 Wall. 152, 19 L.Ed. 129; Carr v. United States, 1879, 98 U.S. 433, 25 L.Ed. 209, 211; State of Minnesota v. United States, 1939, 305 U.S. 382, 59 S.Ct. 292, 83 L.Ed. 235; Metropolitan Life Ins. Co. v. United States, 6 Cir. 1939, 107 F.2d 311, cert. denied 310 U.S. 630, 60 S.Ct. 978, 84 L.Ed. 1400.

[2] The Third Circuit reached a contrary conclusion in United States v. Cless, 1958, 254 F.2d 590, and United States v. Brosnan, 1959, ... F.2d ...

In enacting Section 2410, Congress did more than simply provide for waiver of immunity from suit. It imposed a condition for divestiture of the property rights of the United States, i.e., a period of redemption from the foreclosure sale. If Section 2410(c) is limited to foreclosure by action, followed by a judicial sale, then a Government lien could be extinguished, without notice and without right of redemption, where the mortgagee proceeded under a power of sale; whereas, in foreclosure by action, the Government would have a right of redemption, regardless of state law, —a wholly illogical result in those states, for example, which do not provide any right of redemption. In our opinion, a compliance with subsection (c) is a condition of the Government's consent to be sued in any foreclosure under Section 2410. This requires a judicial proceeding in which the Government may assert its lien and the right of redemption within one year from the date of sale.

Subsection (c) was a part of Section 2410 when the provision was added permitting the United States to be sued in a quiet title action. The purpose of that provision was to allow the clearing of real estate titles of questionable or [fol. 81] valueless government liens,[3] but where the lien,

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[3] Senate Report No. 1646, 77th Cong., 2d Sess. (1942) which accompanied H.R. 5578, the bill which amended Section 2410 in 1942, quotes a letter from the Attorney General to the Chairman of the House Committee on Judiciary, which reads in part:

> "It should be observed in this connection that under existing law there is no provision whereby the owner of real estate may clear his title to such real estate of the cloud of a Government mortgage or lien. Welch v. Hamilton (S.D. Calif.) 33 F. (2d) 224, and U.S. v. Turner (C.C.A. 8), 47 F. (2d) 86.
>
> "In many instances persons acting in good faith have purchased real estate without knowledge of the Government lien or in the belief that the lien had been extinguished. In other instances, mortgagees have foreclosed on property and have failed to join the United States. It appears that justice and fair dealing would require that a method would be provided to clear real estate titles of questionable or valueless Government liens. Accordingly, I suggest that the bill be amended by

though junior, is a valid lien, the Government's consent is predicated upon its right to assert its lien and to redeem from the sale.

The sole issue presented in this case by agreement of the parties was whether the sale under the power contained in the mortgages gave the purchaser a title free and clear of federal tax liens. In our opinion this question must be answered in the negative. A valid federal tax lien may not be extinguished in this manner.[4]

The petition for rehearing is denied.

[File endorsement omitted]

[fol. 82] Clerk's Certificate to foregoing transcript (omitted in printing).

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inserting the phrase 'to quiet title or' between the words 'matter' and 'for the foreclosure of' in line 4 in page 2 of the bill."

This is not the type of case suggested by the Attorney General. Here the bank itself was the mortgagee, foreclosed its mortgage with constructive, if not actual, knowledge of the Government lien, became the purchaser at foreclosure sale, and then itself instituted the action to quiet title.

[4] Legislation to clarify the procedure under Section 2410 is proposed in a comprehensive report of the Committee on Federal Tax Liens of the American Bar Association and adopted by its House of Delegates in February, 1959.

[fol. 84]

SUPREME COURT OF THE UNITED STATES

No. 183, October Term, 1959

BANK OF AMERICA NATIONAL TRUST AND SAVINGS ASSOCIATION, a National Banking Association, Petitioner,

vs.

UNITED STATES OF AMERICA

ORDER ALLOWING CERTIORARI—October 12, 1959

The petition herein for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit is granted, and one and one half hours are allowed for oral argument. The case is set for argument immediately following No. 137.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.